SEP 30 1915
JAMES D. MAHER
CLERK

BRIEF OF APPELLANTS.

File No. 24,900.

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 234 October Term, 1915.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and ANACONDA COPPER MINING COMPANY, a Corporation, Appellants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, BERTHA McGOWAN and ALICE McGOWAN, Appellees.

Page.
Are the allegations in the bill here, including statements of claims of the defendants, the recovery of former judgments and proceedings thereunder, sufficient to show that the case arises under the laws of the United States? 39
Are federal questions involved in this case substantial and undecided by this court 51
Bill, allegations of,—are they sufficient to show that the case is one arising under the laws of the United States 39
Bill to remove a cloud,—what are necessary allegations in? 18
Brief of argument 8
Cloud, definition of 17
Definition of cloud 17
Definition of quia timet 17
Did the lower court have jurisdiction? 56
Does the decision of the case involve a federal question since the case may be decided on questions of fact alone? 53
Does the decision of the case involve a federal question if as to the federal question the decision should be against the contention of the complainants? 52
Effect of passage of Section 6870, Revised Codes of Montana of 1907 8
Federal questions involved in this case,—are they substantial and undecided by this court? 51
Federal questions,—does the decision of the case involve, if upon the federal question the decision should be against complainants' contention 52
Federal questions presented by allegations of bill,—are substantial 51
Federal questions,—does the decision of the case involve, since the case may be decided on questions of fact alone? 53
Former adjudication,—is it necessary to plead, in equity suits? 36
Former judgments,—is it necessary to plead, in equity suits? 36
In equity suits, is it necessary to plead former judgments relied on as a bar? 36
Is it necessary, in equity suits, to plead former judgments relied on as a bar? 36
Judgments, former,—is it necessary to plead in equity suits? 36
Jurisdiction of the United States District Court, sitting in Montana, —is it affected by the passage of Section 6870 of the Revised Codes of Montana? 8
Jurisdiction,—did the lower court have? 56
Laws of the United States,—are the allegations of the bill sufficient to show that this case arises under? 39
Necessary allegations in a suit to remove a cloud 18
Quia timet,—definition of 17
Section 6870, Revised Codes of Montana of 1907,—effect of passage of 8
Specifications of errors 7
Statement of case 1
Suit to remove a cloud,—necessary allegations in 18
Suit in equity to remove a cloud,—what character of proceedings is? 15
What character of proceedings is a suit in equity to remove a cloud? 15
What are the necessary allegations in a bill to remove a cloud? 18

Page.

A

1 Abbott's L. Dict. 235 16

B

Bank vs. Elkins, 51 So. 821 12
Barber vs. Barber, 21 How. 582; 16 L. ed. 226 11
1 Beach Mod. Eq. Pr. Sec. 136 23
1 Beach Mod. Eq. Pr. Sec. 345 37
Black's L. Dict. 981 17
Blandy vs. Griffith, Fed. Case No. 1529 38
Bryar vs. Campbell, 177 U. S. 649; 44 L. ed. 926 38
Butte Land & Investment Co. vs. Merriman, 32 Mont. 402; 80 Pac. 675 46

C

Castro vs. Barry, 79 Cal. 443 19
Chaplin vs. Holmes, 27 Ark. 414 21
City Railway Company vs. Citizens' Railroad Company, 166 U. S. 557; 41 L. ed. 1114 33
Crockett vs. Lee, 7 Wheat, 522; 5 L. ed. 513 37
Crystal Springs Land & Water Company vs. City, 76 Fed. 148; 33
32 Cyc. 1353 18

E

17 Encyc. Pl. & Pr. 339 13
17 Encyc. Pl. & Pr. 277 to 279 17
9 Encyc. Pl. & Pr. 615 37
17 Encyc. Pl. & Pr 340 34
Evans vs. Woodworth, 72 N. E. 1082 38

F

Forsyth vs. Hammond, 166 U. S. 506; 41 L. ed. 1095 9
Frost vs. Spitley, 121 U. S. 552; 30 L. ed. 1010 10

G

Gage vs. Kaufman, 133 U. S. 471; 33 L. ed. 725 25
Gerber vs. Gerber, 40 N. E. 581 38
Goldsmith vs. Gilliland, 22 Fed. 865 18

H

Hamilton Gaslight Etc. Co. vs. City, 146 U. S. 258; 36 L. ed. 963 52
Hicks vs. Rupp, 49 Mont. 40; 140 Pac. 97 5-13
Holland vs. Challen, 110 U. S. 15; 28 L. ed 52 10
Hogg Eq. Proc. Sec. 116 22
Home Telephone & Telegraph Co. vs. Los Angeles, 227 U. S. 278; 57 L. ed. 510 52-54
Horner vs. U. S., 143 U. S. 570; 36 L. ed. 266 52

I

Iron S. M. Co. vs. Mike & Starr Co., 143 U. S. 394; 36 L. ed. 201 51

K

Knudson vs. Curley, 15 N. W. 873 14-34

L

Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685; 41 L. ed. 1165 9

Mc

McLeod vs. Lloyd, 71 Pac. 795 19

Page.

M

ason vs. Washington-Butte Mining Co., 214 Fed. 32 43-45
ettler vs. Warner, 90 N. E. 1099 38
eyer vs. Wilcox, 136 N. Y. S. 337 11
eyers vs. Shields, 61 Fed. 713 10
ichigan Railroad Tax Cases, 138 Fed. 223 52
ississippi Mills vs. Cohn, 150 U. S. 202; 37 L. ed. 1052 10
loore vs. McGuire, 142 Fed. 787 25
loore vs. McGuire, 205 U. S. 214; 51 L. ed. 776 25
loores vs. Clackamas Co., 67 Pac. 662 21
lt. Rosa M. M. & L. Co. vs. Palmer, 26 Colo. 56; 56 Pac. 176 49

N

Nashville vs. Cooper, 6 Wall. 247; 18 L. ed. 851 55
New Orleans vs. Mississippi, 102 U. S. 135; 26 L. ed. 96 55
Northern Pacific Railway Company vs. Hauswirth, 49 Mont. 135; 140 Pac. 516 32

O

O'Hara vs. Parker, 39 Pac. 1004 23
Osborne vs. Bank, 9 Wheat. 740; 6 L. ed. 204 53

P

Pacific Electric Ry. Co. vs. Los Angeles, 194 U. S. 112; 48 L. ed. 896 52
Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S. 685; 42 L. ed. 626 52
People's Savings Bank vs. Layman, 134 Fed. 635 52
Phelps vs. Harris, 101 U. S. 370; 25 L. ed. 855 24
6 Pom. Eq. Jur., Sec. 728 16

R

Railroad Company vs. Slocum, 77 Fed. 345 10
Railway Company vs. Ziegler, 167 U. S. 65; 42 L. ed. 79 33
Rausch vs. Trustees, 8 N. E. 25 13
Raymond vs. Chicago Union Traction Co., 207 U. S. 20; 52 L. ed. 78 52
Richards vs. Mohr, 143 Pac. 1102 23
Ritchie vs. McMullen, 159 U. S. 235; 40 L. ed. 133 35

S

Siler vs. Railroad Co., 213 U. S. 175; 53 L. ed. 753 52-54
South Butte Mng. Co. vs. B. & V. Mng. Co., on file in the lower court 50
St. Louis I. M. & S. Ry. Co. vs. Davis, 132 Fed. 629 55
St. Paul M. & M. Ry. Co. vs. Railway Co., 68 Fed. 2 53
2 Story Eq. Jur., Sec. 825 15
Story Eq. Pl. Sections 255 and 256 22

STATUTES

Revised Codes of Montana of 1907, Sections 6115, 6116, 6870 5
Act of March 3, 1911, Chap. 231, Sec. 57 (Federal Statutes annotated, 1 Supplement 1912, 155) 11
Sec. 2326, R. S. U. S. 42
Sec. 2333, R. S. U. S. 48

T

Teal vs. Collins, 9 Oreg. 89 20
Tennessee vs. Davis, 100 U. S. 257; 25 L. ed. 648 55
Turley vs. Turley, 1 S. W. 891 36

V

Van Zile Eq. Pl. & Pr. Sec. 428 22

W

Walton vs. Perkins, 10 N. W. 424 ..... 13, 14, **34**
Welles vs. Rhodes, 22 Atl. 286 18
Whitney vs. Port Huron, 88 Mich. 268; 26 Am. S. Rep. 291 17
Wiard vs. Brown, 59 Cal. 194 12
Williamson vs. U. S., 207 U. S. 425; 52 L. ed. 278 ..... 52, 55

File No. 24,900.

SUPREME COURT OF THE UNITED STATES.

No. 617. October Term, 1915.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, a Corporation, and ANACONDA COPPER MINING COMPANY, a Corporation, Appellants,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, BERTHA McGOWAN and ALICE McGOWAN, Appellees.

STATEMENT OF THE CASE.

This suit was begun by the appellants, as complainants, filing their bill in the United States District Court, for the District of Montana. The purpose of the suit is to remove certain clouds from title of the complainants as to certain land, the same being a portion of the Butte & Boston Placer Mining Claim, Survey No. 3379, which said land is particularly described and is situated in Silver Bow County, Montana. The bill, besides alleging the existence of the jurisdictional amount in controversy, and the corporate existence of two of the complainants, alleges that the complainants are the owners, and in possession of the said land, and that they, and their predecessors in interest had been, continuously, for more than twenty years immediately preceding the commencement of the action, in possession of the said land; that the title of the complainants was based upon undisputed evidence, to-wit: A patent from the United States of America; that the predecessors in interest

of the complainants derived their title as to such land from a patent from the United States of America, a copy of the patent being annexed to the bill marked Exhibit "A," and made a part thereof, from which patent it appears that it was dated December 19, 1895; that the same was for a placer mining claim, and was based upon the location of such ground as such, and contained a reservation of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits known to exist on the date of the application for such patent; that upon certain dates specified, the earliest being June 2, 1900, and the latest being January 14, 1913, nine different declaratory statements of location, or certificates of location of lode mining claims were filed for record and were recorded in the Office of the County Clerk and Recorder of Silver Bow County, Montana, in certain specified volumes and pages, and that they there so remained of record at the date of the filing of the bill. The said paper writings, by copy thereof, marked respectively Exhibits "B" to "J," inclusive, are annexed to, and made a part of the bill, and from them it appears that each of them, upon its face appears to be valid; that each of them recites that within the boundaries thereof discovery had been made of a lode bearing silver, copper and other valuable deposits of mineral; that each of them gives notice of the location by certain locators of a lode mining claim embracing a piece of ground 1500 feet in length extending along the vein or lode located, and having a width of 300 feet on each side from the middle or center of the said lode, and that the earliest of such locations was made on the 19th day of March, 1900, and that the latest of such locations was made on the 20th day of November, 1912.

The bill further alleges that the land embraced within the exterior boundaries of such locations is either wholly or partly the land alleged to be owned by the complainants.

The bill further alleges:

> "That the land herein described is embraced within the exterior boundaries of two lode locations made or attempted to be made prior to the date of the location of the said Butte & Boson placer, which lode locations were known respectively as Point Pleasant Lode claim and Pleasant View Lode claim; that said last named lode claims if valid in the beginning continued in

force (except for the proceedings hereinafter set forth) to and including the date of the issuance of said patent; that the said Point Pleasant and Pleasant View Lode claimants filed in the United States Land Office at Helena, Montana, in due time two adverse claims to the said application for patent for the said Butte & Boston Placer, which said adverse claims were in due form of law and were filed during the period of publication of notice of said application for patent and in the same said Point Pleasant and Pleasant View lode claimants by reason of said Point Pleasant and Pleasant View Lode claims asserted adversely to said applicants a claim of right to the possession of so much of the land embraced in said application for patent as was in conflict with said lode claims and within thirty days after the filing of said adverse claims, said adverse claimants with respect to each of said adverse claims, filed against said applicants in the Second Judicial District Court of the State of Montana a complaint in due form of law to determine the right of possession as to the land embraced in said adverse claims; said applicants filed answer in each of said suits, which suits were regularly heard and determined and a decision and judgment duly given and made in each of them in favor of the defendants therein and the judgment roll in each of said suits duly certified was filed in the said United States Land Office, together with the requisite description and certificate of the Surveyor General, whereupon said proceedings and judgment rolls being certified to the Commissioner of the General Land Office, and on payment of the purchase price for the land said patent was issued in conformity with said judgments; that the said defendants and each of them claim that the said patent was to the extent of the land embraced in said Point Pleasant and Pleasant View lode claims wholly invalid and that it was rendered so invalid because of the existence and continuance in force of said claims at the date of issuance of said patent and if not so invalid that the said land herein particularly described and all of the same with any and all lodes, veins and deposits of mineral therein contained was, because of the known existence by said applicants for

patent at the date of said application, within said described land of certain veins and lodes, reserved and excepted from the said patent and that the title thereto remained in the United States of America until so located or attempted to be located by the said defendants or their predecessors in interest and said defendants further claim that the lode location of any of the said lodes and veins within the said ground and by them so claimed to be subject to location may embrace an area of surface ground having a length and breadth of 1500 feet and 600 feet respectively, and all of the said pretended lode locations are so made as to embrace an area of surface ground of that extent * * * "

"That no vein or lode within the meaning of the terms as used in Section 2333 of the Revised Statutes of the United States was known at the date of said application to exist within said Butte & Boston Placer Mining Claim; that if any veins or lodes had been so reserved or excepted or if such patent as to the same was invalid, a lode location of any one of them could not embrace an area of enclosing surface ground exceeding 25 feet on each side of the center of the vein or lode located and could not embrace any portion of such vein or lode not actually uncovered and exposed to view at or prior to the date of said application for patent and on said date there had been no opening made in said ground beneath the surface of bedrock and no exposure of the surface of bedrock of a greater extent than ten feet in any one direction * * * "

"Said pretended lode claims are and each of them is entirely invalid and the said declaratory statements of location and certificates of location, so of record, are and each of them is invalid and constitute and each of them constitutes a cloud upon the title of the complainants in and to the said premises and every part thereof, and reduce the market value thereof. * * * "

The prayer of the bill is that the cloud caused by the recording of the said declaratory statements of location, and certificates of location, and each and all of them, be removed, and the same decreed to be no cloud upon the title of the complainants in and to the said premises, and

that the title of the complainants therein be quieted, and for such other relief in the premises as equity and good conscience may require. (T. 9 to 33.)

Certain of the defendants filed motions to dismiss upon the ground that the court was without jurisdiction (T. 34 to 38), which said motions were sustained, an opinion filed, and an order made for a decree dismissing the bill for an alleged lack of jurisdiction (T. 2 to 5), and a decree was made and entered dismissing the suit upon that ground (T. 6), from which decree this appeal is prosecuted.

At the time of the commencement of this suit, and long prior thereto, there was in force in Montana Sections 6115, 6116 and 6870 of the Revised Codes of Montana of 1907, which sections are as follows:

> "6115. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."
>
> "6116. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury within the provisions of the last section."
>
> "6870. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Prior to the date of the commencement of this suit, to-wit: March 28th, 1914, the said Section 6115 and 6116 had been construed by the Supreme Court of the State of Montana in the case of:

Hicks vs. Rupp, 49 Mont. 40; 140 Pac. 97.

in the opinion in which case the court, concerning the said sections, said:

> "We inquire first, then, whether the facts stated justify the equitable relief demanded. A suit to have canceled and declared void an instrument which constitutes a cloud upon the title of plaintiff is referable to the general jurisdiction which courts of equity ex-

ercise upon the principle of quia timet. Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064; Fratt v. Daniels-Jones Co., 47 Mont. 487, 133 Pac. 700; Story's Equity Jurisprudence (10th Ed) Sec. 701; 2 Pomeroy's Equitable Remedies, 685; 6 Cyc. 286. In the Revised Codes are found these sections:"

Then follows a copy of said Section 6115 and 6116, and then continuing, the court further said:

"These provisions, taken together, clearly define the rule, with its limitations, under which the equitable jurisdiction of the court may be invoked. The instrument in question must be in writing and must be of such a character that, if left outstanding, it will menace with injury the person against whom it is void or voidable; hence, if its invalidity appears directly or constructively upon its face, the court may not interfere.

"Clearly, also, if it does not appear, either from the instrument itself or the statement of facts explaining its character, that, if left outstanding, it will or may result in injury, the court ought not to interfere. In other words, a case must be stated which falls within the rule. Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Hibernia S. & L. Soc. v. Ordway, 38 Cal. 681; 6 Cyc. 324. In Hibernia S. & L. Soc. v. Ordway, it was said: 'In an action to remove a cloud there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. To merely name the instrument, therefore, might not ordinarily be sufficient.' In order to invoke the jurisdiction, therefore, the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury.

"The complaint here fails to disclose that the contract is of such a character that, if it remains outstanding, it will be a menace to plaintiffs' title, or probably imperil it in any way."

This appeal involves the following questions:

First—Was the United States District Court, for the District of Montana, by the passage of the said Section

6870 by the Legislature of Montana, deprived of the power to entertain jurisdiction in suits to remove a cloud from the title of land situated in Montana, the facts necessary to maintain such suit prior to the passage of such statute being alleged?

Second—If not, is it necessary, in such a suit, to allege the facts showing the actual invalidity of the paper writings, the cloud cast by which, the complainants seek to have removed? and

Third—In such a suit, is it necessary to allege the facts by way of explanation of the character of such paper writing which show that if such paper writing be left outstanding it will menace complainants with injury.

Fourth—Do the rules of pleading in equity cases require that a former adjudication relied upon as an absolute bar appearing on the face of the record shall be pleaded in order that it may be available?

Fifth—If questions two, three and four, or any of them, are answered in the affirmative, then are the allegations in the bill in this case sufficient to show that the case involves in its decision the construction of a statute of the United States?

All of which questions are embraced in question——

Sixth—Did the lower court have jurisdiction?

SPECIFICATION OF ERRORS.

Appellants allege that the decree which dismissed the suit because of an alleged lack of jurisdiction is erroneous. They assign as error:

First—The trial court erred in sustaining the motions of the appellants to dismiss the bill herein on the ground that the trial court had not jurisdiction of the said cause.

Second—The trial court erred in holding that it had no jurisdiction of the said cause and in dismissing the bill herein.

Third—The trial court erred in entering a decree of dismissal herein and in adjudging and decreeing that the said bill be dismissed.

BRIEF OF ARGUMENT.

The foregoing questions will be taken up in the order stated.

I.

HAS THE PASSAGE OF THE SAID SECTION 6870 HAD THE EFFECT OF DEPRIVING THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MONTANA, OF POWER TO ENTERTAIN JURISDICTION OF SUITS TO REMOVE CLOUDS FROM THE TITLE OF LAND SITUATED IN MONTANA?

The learned judge of the court below held that the suit is one to quiet title. We do not understand from the decision rendered, that it was his opinion that the facts alleged were not sufficient to state a cause of suit for the removal of a cloud before the passage of the said Section 6870, or that anything was stated beyond that which was necessary in such statement. The allegations in the bill that the complainants are the owners of the land in question, and that the defendants claim an interest therein adversely to the complainants by virtue of certain mining locations of record in Silver Bow County, Montana, are, of course, a part of the statement of the facts necessary to constitute a cause of suit for the removal of a cloud. If we look beyond the allegations of fact and consider the prayer there is nothing to indicate any intention to proceed under the said Section 6870. In suits under the same and similar statutes, the prayer usually is that the defendant be required to set forth his claim or interest that it may be adjudged by the court. In the present case the prayer is that the cloud cast by certain paper writings of record be removed. To that is added a prayer that the title of the complainants be quieted. That, however, is a prayer that such title be quieted as against the claims asserted by reason of the locations complained of, and is merely another way of asking that the cloud be removed.

The decision of the lower court in effect is that since the passage of the said Section 6870, suit cannot, in Montana, be maintained to remove a cloud merely, but that suit, under the said Section 6870 may be maintained in

cases where before its passage a suit could have been maintained for the removal of a cloud, and that, therefore, a suit to remove a cloud is necessarily a suit under the said Section 6870, and that in such suits it is not necessary to allege the nature of the adverse claim asserted by the defendants, and he might have added that in a suit under such a statute neither is it necessary to allege the facts which show the actual invalidity of the instrument of record which casts a cloud upon the title of the complainant, or to allege in general terms that such instrument is invalid, or to allege facts to show that the complainants are menaced with injury. It is therefore clear that if a suit may be maintained to remove a cloud, the same facts being alleged which were necessary before the passage of the said statute, Section 6870, then the position taken by the lower court is erroneous.

The precise question has many times been before the courts for decision. Excepting for the decision of the lower court in this case it has never been held that statutes similar to the said Section 6870 had such effect.

It has been many times held by this court that in suits in equity, as well as in actions at law, it will follow the construction placed on a state statute by the court of last resort of such state.

> Forsyth v. Hammond, 166 U. S. 506;
> Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

In view of such decisions, and the decision in Hicks v. Rupp, supra, how can the statement of the trial court that "the distinction between suits to quiet title and suits to remove a cloud under modern statutory enactments have little more than an historical interest" be sustained? The effect of such decision by the Montana Supreme Court is the same in effect as though there were added to said Section 6870 another section, as follows:

> "A suit to have cancelled and declared void an instrument which constitutes a cloud upon the title of the plaintiff may be maintained in a court of equity under the general jurisdiction which such courts exercise upon the principle quia timet. In such a suit the plaintiff shall state in his complaint the facts which show the invalidity of the instrument which is complained of as

constituting the cloud, and which is apparently valid, and in order that the suit may be maintained it must appear from the allegations of fact in the complaint that if such instrument be left outstanding it will, or may result in injury to the plaintiff."

What is said by the Supreme Court of Montana affects only the right to maintain a suit to remove a cloud in the Montana State Courts, but if the passage of the said Section 6870 did not affect such right, it, of course, could not by any possibility be construed as affecting the right to maintain such a suit in a Federal Court. If, however, the said Section 6870 had the effect of depriving a suitor of the right to maintain a suit to remove a cloud in the Montana State Courts it could in no way abridge the powers of courts of equity of the United States, although in the Federal Courts any enlargement of equitable rights by a state statute will be recognized;

Frost v. Spitley, 121 U. S. 552; 30 L. ed. 1010.

The rule is stated in

Railroad Company v. Slocum, 77 Fed. 345, and Meyers v. Shields, 61 Fed. 713

to the effect that the Federal Courts in administering equitable relief are not bound by any restrictions of the local law, but may have the benefit of any enlargement of equitable rights by a state.

The power to grant relief in certain cases by perpetually enjoining the assertion of any claim to the title, and to remove clouds from the title to real property, is inherent in courts of chancery.

Holland vs. Challen, 110 U. S. 15; 28 L.ed. 52.

The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union. Bills to remove a fraudulent judgment as a cloud upon the title of the debtor are within the jurisdiction of equity.

Mississippi Mills v. Cohn, 150 U. S. 202; 37 L. ed. 1052.

This court in the case of

Barber v. Barber, 21 How. 582; 16 L. ed. 226,

concerning the power of the states to abridge the powers of the Courts of Equity of the United States, said:

> "It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local laws; for the equity jurisdiction of the Federal Courts is the same in all the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunal."

The power of the Federal Courts of Equity to remove a cloud, under certain circumstances, is recognized by the Federal Statutes.

> Act March 3, 1911, Chap. 231, Sec. 57
> (Federal Statutes Annotated, 1 Supplement 1912, 115.)

In the courts of other states having a statute similar to the said Section 6870, it has been uniformly held that the right to maintain a suit to remove a cloud remains unaffected.

In the state of New York a statute similar to our Section 6870 was passed. It was held by the Supreme Court of that state after the passage of that statute that suit might be brought to remove a cloud from title under the same circumstances, and by alleging the same facts precisely as were required prior to the passage of such statute.

From the opinion of the court in

Meyer v. Wilcox, 136 N. Y. S. 337

we quote the following:

> "The relief against a cloud on a title by a suit in equity to remove it was not merged in the statutory action for the determination of claims to real property provided by Code Civ. Proc. Par. 1638 et seq; and hence the complaint in such suit need not comply with the requirements prescribed by the Code relating to complaints in the statutory action."
>
> "While the relief obtainable in an action in equity to remove a cloud from a title is very similar to that obtainable in a statutory action under Code Civ. Proc.

> Par. 1638 et seq; the court in the equitable action possess all the powers possessed by the Court of Chancery prior to the adoption of the Code of Procedure in 1848."

The Supreme Court of West Virginia, under like circumstances, declared that courts of equity of that state had the same powers after the passage of a similar statute that they had previously, to remove a cloud from title, the bill containing the necessary allegations for such relief. The language employed on this point by the court in its opinion in

Bank v. Elkins, 51 So. 821

is as follows:

> "Independent of our statute for the quieting of titles and the determination of claims to real estate (Code, Par. 5443 et seq.) courts of equity have jurisdiction to cancel and remove a *specifically described* cloud upon the complainant's title, when the owner is in possession, and when the evidence of the alleged cloud is not void on its face, and extrinsic evidence is necessary to show its invalidity."

The italics are ours.

From

Wiard v. Brown, 59 Cal. 194

we quote as follows:

> "Wherever an instrument of writing exists, which has been obtained without consideration, or has become a nullity, or which, if left outstanding, may cause injury to a plaintiff, or may be vexatiously used against him, after the evidence to impeach or invalidate it is lost or may throw a cloud or suspicion over his title, a court of equity will afford relief by ordering it to be delivered up and cancelled. (Sec. 3412, C. C.; 2 Story's Eq., Sec. 705.)"

Section 3412 of the Civil Code, and Section 738 of the Code of Civil Procedure, of California, are the same, respectively, as said Sections 6115, and 6870. In the quotation above, the citation in support of the same proposition of Section 3412 of the Civil Code of California, and 2

Story's Equity, Section 705, indicates that actions maintainable under the said section, and those maintainable prior to the passage of the statute under the equity practice to remove clouds are of the same character.

The trial court in rendering decision evidently went upon the theory that as the relief granted in a suit to remove a cloud and that granted in a statutory suit to determine an adverse claim are of the same character, no distinction can be made between the two kinds of suits. We may concede for the purpose of argument that there is no substantial difference between a decree removing a cloud cast by an instrument of record under which the defendant claims, and a decree quieting the title of the complainant merely as to the claims of the defendant made under such instrument. The two kinds of suits, however, are nevertheless essentially different, not only in the extent of the relief granted, but also in the necessary allegations of the complaint, and therefore, also, of course, in the proof required on the part of the complainant. In the statutory action to determine an adverse claim it is only necessary to allege that the plaintiff is the owner of the land, describing it, and that the defendant asserts some claim of title or interest therein adverse to him. It is not necessary to allege that the claim of the defendant is invalid, or any facts showing its invalidity,

Rausch v. Trustees, 8 N. E. 25.
17 Encyc. Pl. Pr. 339.
Walton v. Perkins, 10 N. W. 424,

while in a suit to remove a cloud it is necessary to allege ownership of the real property in question by the complainant, that a claim of title appearing in some legal form is of record, with a statement of facts in description of such claim sufficient to show that if such instrument is not cancelled that there is reasonable ground for apprehending that it will cause injury to the complainants, and that the instrument so of record which is apparently valid, is in fact valid.

Hicks v. Rupp, supra.

A decree rendered in a suit to cancel as a cloud a specifically described instrument of record would, of course, not be a bar to the assertion of a claim on the part of the defendant not based upon such instrument.

In

Knudson v. Curley, 15 N. W. 873,

and in

Walton v. Perkins, supra,

it was held that a complaint which is clearly one to remove a specified cloud on title to real estate, cannot, if it fails to allege facts showing that the instrument alleged to be a cloud is in fact invalid, be sustained upon the ground that it states a cause of action under Sections 2 and 3, Chap. 75, General Statutes of Minnesota of 1878, which section is substantially the same as the Montana Statute, said Section 6870.

The complaint in each of those cases was held to be defective as a complaint to remove a cloud, because it failed to state the facts showing the invalidity of the instrument which it was claimed constituted a cloud, the allegation being merely that such instrument was invalid which it was held was the statement of a legal conclusion merely.

From the opinion rendered in Walton v. Perkins, supra, we quote as follows:

> "For if it be conceded that a complaint attempting to set forth a cause of action of one character may be sustained if there be facts enough to show a cause of action of another character, or that if the facts show plaintiff entitled to some relief, though not to any part of that demanded, nor of the character of that demanded, it is good against a demurrer; still it does not follow that where the complaint is clearly intended as a complaint in an ordinary action, it will be sustained against a demurrer merely because, upon some of the facts stated, the plaintiff might bring an action given by statute, special and extraordinary in its nature, and not proceeding according to the usual course of actions. Whether a complaint can be held good on such ground is the question in this case; that is, whether a complaint similar to the old bill in equity to cancel an instrument claimed to operate as a cloud upon real estate may be treated as a complaint in an action under the statute. As the statute has been construed in this state, the action given by it is in some of its features extraordinary, and contrary to the usual course of action. All that the complaint need allege

of defendant is that he claims some estate or interest in or lien on the land, without showing that the claim is invalid, or that defendant does plaintiff any wrong in making it. Steele v. Fish, 2 Minn. 153; Hamilton v. Batlin, 8 Minn. 403."

Concerning the insufficiency of the complaint in Knudson v. Curley, supra, the court in the opinion said:

> "The complainant was not good as one to remove a specific cloud from the title, because it alleges no facts showing that the tax sale or certificate was not valid; the only allegation in that regard being 'that said sale of said land was made without authority of law, and is void.'"

It is altogether clear, we submit, that the passage of said Section 6870 did not have the effect of depriving the United States District Court, for the District of Montana, sitting as a court of equity of any powers which it might have exercised before the passage of such statute, and that a suit to remove a cloud may be maintained by alleging such facts as were necessary before the passage of such statute.

That being so, we inquire:

II. and III.

WHAT ARE THE NECESSARY ALLEGATIONS IN A SUIT TO REMOVE A CLOUD?

A preliminary question is—

WHAT CHARACTER OF PROCEEDING IS SUCH A SUIT?

In Holland v. Challen, supra, this court in the course of the opinion concerning the distinction between suits to quiet title and suits to remove a cloud, said:

> "A bill quina timet or to remove a cloud from the title of real estate differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated

wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests."

In

6 Pom. Eq. Jur., Sec. 728

it was said:

"Suits in chancery to quiet title, in the nature of bills of peace, have been defined in the last chapter. The distinction between these and suits to remove a cloud is not always observed. The equitable relief to remove a cloud from title is granted on the principle quia timet; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title."

And from

2 Story Eq. Jur., Sec. 825

we quote the following:

"Now bills in equity quia timet answer precisely to this latter description. They are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity because he fears (quia timet) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief."

To the same effect is

1 Abbott's L. Dict. 235,

where it is said:

"The jurisdiction exercised in cases of this kind is founded upon the administration of a protective or preventive justice. Relief is afforded upon the principle of quia timet; that is, that the instruments sought to be canceled may be vexatiously or injuriously used against the rightful owner, when the evidence to impeach them may be lost."

The definition of quia timet found in

Black's L. Dict. 981

is as follows:

> "Because he fears or apprehends. In equity practice, the technical name of a bill filed by a party who seeks the aid of a court of equity, *because he fears* some future probable injury to his rights or interests."

From

17 Encyc. Pl. & Pr. 277 to 279

the following extract is copied—

> "A bill to quiet title, strictly considered, is substantially a bill of peace, and will generally lie only in favor of a person in possession who has already established his title by one or more successful contests at law.
>
> "A bill to remove a cloud is a bill to procure the cancellation, delivery up, or release of an instrument, incumbrance, or claim constituting a cloud on the plaintiff's title, and which may be used to injure or vex the plaintiff in the enjoyment of his title. Such bills will lie without a previous establishment of the plaintiff's title at law, for it may often happen, as where the plaintiff's possession has not been disturbed, that he can maintain no action at law to test the defendant's claim."

As defining that which constitutes a cloud, the following extract is from

Whitney v. Port Huron, 88 Mich., 268; 26 Am. S. Rep. 291:

> "This expression, chiefly used in equity jurisprudence, designates some instrument or proceeding, some deed, mortgage, judgment, decree, assessment, tax, or the like, which apparently, and upon its face, assuming it to be valid, impairs the title of a party to real property, but which, upon extrinsic facts, is void, and ought equitably to be annulled or removed."

NECESSARY ALLEGATIONS IN A BILL TO REMOVE A CLOUD.

We have already referred briefly to this subject in discussing question I., where in support of our contentions as to this point we cited the case of Hicks v. Rupp, supra. In further support of the statements there made as to what facts are necessary to be alleged, we quote from

Welles v. Rhodes, 22 Atl. 286

the following:

> "Under these circumstances, the power to remove a cloud from a title, and to restrain by injunction the prosecution of a suit at law, is not exercised as a matter of course, nor under any universal principle of law requiring its exercise. It is preventive, as we have said, and very much must depend upon the extent and imminence of the danger threatened, and the view which will be taken of the case by a discreet judge."

From

32 Cyc. 1353

we quote the following:

> "In a suit to remove a cloud on title, it must be shown in the bill that such a cloud exists before relief can be given against it, and, in such a case, the bill must, in addition to specifying the writing or matter which constitutes the alleged cloud, state the facts which give it apparent validity, as well as those which show its invalidity."

In

Goldsmith v. Gilliland, 22 Fed. 865

it was said:

> "When a suit is brought to remove a certain cloud from the title of the plaintiff, in the nature of things it must be shown in the bill that there is such a cloud before relief can be given against it. In such a case the bill must, in addition to the writing or matter which constitutes the alleged cloud, state the facts

which give it apparent validity as well as those which tend to show its actual invalidity. Teal v. Collins, 9 Or. 91. But, in a suit brought under section 500 aforesaid, the plaintiff is not required to state the nature or circumstances of the defendant's claim, or to deny knowledge thereof."

The Supreme Court of Oregon in

McLeod v. Lloyd, 71 Pac. 795

says:

"A suit to remove a cloud upon a title is instituted to determine the invalidity of an apparently efficacious instrument, the infirmities of which cannot be ascertained from inspection, but resort must be had for that purpose to extrinsic evidence, to let in which, it is necessary to allege in the complaint the facts constituting such invalidity. Teal v. Collins, 9 Or. 89; Moores v. Clackmas County, 40 Or. 536, 67 Pac. 662. In Shannon v. Portland, 38 Or. 382; 62 Pac. 50, Mr. Justice Wolverton, commenting upon the sufficiency of the allegation and the nature of the proof necessary to sustain a suit of this character, says: "It is essential to the maintenance of such a suit to assert and establish (1) the particular muniment or record constituting the cloud; and (2) the infirmity attending it which renders it a nullity as to the complainant, for, if he does not show it to be a nullity, he must fail of his purpose."

In

Castro v. Barry, 79 Cal. 443

which was an action under the statute to determine an adverse claim it was contended by the appellant that it was necessary to state in the complaint the nature of the defendant's claim. The court overruled that contention, but the reason given for its decision was that the action was one to determine an adverse claim under the statute, on account of which it was to be distinguished from a suit to remove a cloud. It was conceded that in a suit to remove a cloud such allegations as to the claims of the defendant are necessary. In the opinion of the court it was said:

"But in this the learned counsel overlooks the distinction between an action to determine adverse claims, which are provided for by the Code of Civil Procedure, and which in this state are commonly referred to as actions to quiet title, and suits to have an instrument cancelled, or adjudged to be void, which are usually called actions to remove a cloud.

"Suits to have an instrument cancelled, or adjudged to be void, were quite common in the old chancery practice, and constituted one of the applications of the principle quia timet."

And in another part of the opinion the court said:

"The distinction between the two kinds of action is clear. They are different not merely in form (for we have no forms of action in the common law sense), but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights and which may be ordered to be destroyed in whosesoever hands it may happen to be. While in the latter, the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property, whether such claim be founded upon evidence or utterly baseless. It is not aimed at a particular piece of evidence, but at the pretensions of an individual."

"The plaintiff *therefore* is not required to set forth *the nature of the defendant's claim.*"

The italics are ours.

The rule that in a suit to remove a cloud it is necessary to particularly describe the claims of the defendants while it is not necessary to do so in a suit to determine an adverse claim under the statute is clearly stated in the case of

Teal v. Collins, 9 Oreg. 89.

The opinion in that case, in part, is as follows:

"A cloud upon title is a title, or incumbrance, apparently valid, but, in fact, invalid. (Bissell v. Kellogg, 60 Barb. 629).

"In such suits it has been held that there can be no

question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. (Hibernia S. & L. v. Ordway, 58 Cal., 681.

"It is an elementary rule that every fact essential to the plaintiff's title, to maintain the bill and obtain relief, ought to be stated in the bill, otherwise the defect will be fatal." (Story's Eg. Pl., Sec. 257).

"In declaring the requisites of a complaint to remove cloud upon title under a statute somewhat similar to our own, it is said, in Wals v. Grosvenor (31 Wis., 684) that, 'the complaint ought to disclose the nature of the defendant's claim which has a tendency to throw a cloud over the title, and state such facts and circumstances in respect to such claim as show its invalidity, before a court of equity will interfere and and direct it to be released and canceled.'" (Collart v. Fisk, 38 Wis., 243).

"Before suit is brought to remove a cloud upon the title, the plaintiff ought to know there is one, and in what it consists, and state the facts.

"For these reasons we think the complaint is fatally defective in not stating the nature of the defendant's claim, or chain of conveyances, showing in what their invalidity consists. The judgment of the court below is reversed."

One of the points decided in

Chaplin v. Holmes, 27 Ark. 414

is correctly stated in the syllabus as follows:

"The complaint should allege, by way of recital, or otherwise, such facts, under which defendant claims as would give defendant some color of title, or such prima facie evidence of title as to require proof of extraneous facts to avoid them."

From the opinion in

Moores v. Clackamas Co. 67 Pac. 662

we quote as follows:

"We have said, as it respects the manner of instituting the proceeding, that a suit to remove a cloud

and one to quiet title are essentially different. By the former, a plaintiff is required to set up the nature and purpose of defendant's claim or pretended muniment, so far as he is able, following it with the statement of such facts and circumstances regarding it as will indicate its invalidity, and thereby show his right to have it removed as a cloud (Teal v.Collins,9 Or.89); while in the latter it is only necessary for the pleader, after the necessary averments of title and possession, to allege that defendant claims an adverse interest or estate and call upon him to set it forth."

The rule is clearly stated in

Van Zile Eq. Pl. & Pr. Sec. 428,

as follows:

"The claim asserted by the defendant adverse to the plaintiff must also be set out particularly, so that it may be determined whether it is a claim or title apparently good upon its face, or such a claim or such a title as the plaintiff will be allowed to attack in a court of equity."

Story Eq. Pl. Sec. 255 and 256

contain the following:

"Sec. 225 * * * In the next place it is a general rule that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge ought to be alleged positively and with precision * * *

"On the other hand the claims of the defendant may be stated in general terms. * * * "

"Sec. 255. Still, however, even when the fact rests within the knowledge of the defendant if it constitutes a material allegation in the bill and is the foundation of the suit it must be clearly stated."

From

Hogg Eq. Proc. Sec. 116

we quote the following:

"The property in question should be described in the

bill, with sufficient certainty for identification and the adverse claim asserted by the defendant should be set forth in the bill in such manner as to show to the court that the claim amounts to a cloud upon the title of the plaintiff's property."

From

1 Beach Mod. Eq. Pr. Sec. 136

we quote:

"An allegation in a bill to remove a cloud on title that 'said claim is an injury' to complainant is not sufficient unless facts are stated from which the court can see that there is or may be a legal injury by the existence of the claim."

From

O'Hara v. Parker, 39 Pac. 1004

we quote:

"The complaint in the case at bar was framed with the purpose in view of removing a cloud from title. It is held that in such a suit the complaint should state the nature of defendant"s claim which constitutes the alleged cloud, and then state such facts and circumstances in respect to the claim as to show its invalidity. The suit is substantially one to determine the validity of some instrument or proceeding which it is claimed injuriously affects or clouds plaintiff's title. Teal v. Collins, 9 Or. 91. A suit to remove a cloud and one to quiet title are essentially different."

The state of Oregon has a statute similar to said Section 6870. In a late decision (September 29th, 1914) the Supreme Court of that state held a suit to remove a cloud maintainable.

Richards v. Mohrs, 143 Pac. 1102;

From the opinion in which case we quote the following:

"(1) A cloud on a title to real property is created by an attempted conveyance thereof by a stranger or an apparent lien imposed thereon in invitum, which, if valid, would impair the owner's estate in the prem-

ises, but which grant or incumbrance can be shown by extrinsic evidence to be void or inapplicable to the estate in question. A suit to remove such cloud is an endeavor in a court of equity to have declared invalid a seemingly operative instrument, decree, judgment, or other proceeding, the weakness of which cannot be disclosed from mere inspection, but recourse must be had to evidence aliunde, to render which admissible it is essential to set forth in the complaint the facts constituting such infirmity. Teal v. Collins, 9 Or. 89; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004; Shannon v. Portland, 38 Or. 382, 62 Pac. 50; Moores v. Clackamus County, 40 Or. 536, 67 Pac. 662; McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

"(2) If this suit was designed to remove a cloud from the title to real property, the complaint is insufficient because it does not set forth the particular muniments constituting the outstanding claim or incumbrance, or allege the infirmities which render such written evidence void. Shannon v. Portland, 39 Or. 382, 62 Pac. 50."

The rule which renders it necessary that in a bill to remove a cloud the claim of title of the defendant should be particularly described is clearly recognized by this court in the case of

Phelps v. Harris, 101 U. S. 370, 25 L. ed. 855

where the court said:

"The questions, what constitute such a cloud upon title (sufficient to give a court of chancery jurisdiction), and what character of title the complainant himself must have in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established by those courts (courts of chancery). Prominent amongst these are: First, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it must not only be clearly invalid or inequitable, but must be such as may either at the present or at a future time, embarrass the real owner in controverting it."

The practice in the Federal Courts with respect to the allegations in a bill to remove a cloud from title are indicated in the case of

Gage v. Kaufman, 133 U. S. 471; 33 L. ed. 725.

From the opinion in that case, delivered by Mr. Justice Gray, we copy the following:

> "The bill alleged that the plaintiff was seized in fee simple of the lands; *that the defendant claimed title to them* under two pretended tax deeds to him from the county clerk, recorded in the office of the county recorder (copies of the records of which were set forth in the bill, showing deeds in the form prescribed by Sec. 221 of Chap. 120 of the Revised Statutes of Illinois of 1874); and further alleged that there was no advertisement of any public sale for nonpayment of taxes on the day mentioned in either deed; that there was no judgment or precept on which the lands could have been sold; that there were no taxes unpaid on which the sale could have been made; that no notice to redeem the lands from such pretended sale was given by the holder of any certificate of such sale, as required by the constitution and statutes of Illinois; and that no such notice or evidence thereof was filed or recorded by the county clerk."

The italics are ours.

The case of

Moore v. McGuire, 142 Fed. 787

and the same case on appeal

Moore v. McGuire, 205 U. S. 214; 51 L. ed. 776

was a suit brought by the complainants, citizens of Illinois against the defendants, citizens of Mississippi, in the Circuit Court of the United States, for the Eastern District of Arkansas, for the removal of a cloud from title to certain real property known as Island No. 76 in the Mississippi river, and alleged by the bill to be in Desha county, Arkansas.

The bill set forth the chain of title upon which the plaintiff relied. We copy the statement concerning that portion of the bill in which is set forth the claims of the de-

fendants from the report of the decision by the Circuit Court which is as follows:

> "It is then charged that the island is in the Mississippi river, lying in front of portions of Bolivar county, state of Mississippi, and Desha county, state of Arkansas; that, ever since the sales made by the government and the conveyance by the state of Arkansas, the lands were assessed and subjected to state and county taxes in Desha county, Arkansas. It is further charged that by act of congress of 1817, admitting the state of Mississippi into the Union, the western boundary of that state was fixed on the eastern bank of the Mississippi river, which has never been changed by any act of congress, and that the said east bank of the Mississippi river is still the western boundary of that state; that in 1836 (Laws 1836, p. 9) the legislature of that state, in establishing the county of Bolivar, fixed the boundary line on the west as 'to the Mississippi river; thence up the Mississippi river.' It is also charged that at the time of the admission of the state of Arkansas into the Union in 1836, and at the date of the survey of the public lands in said state by the surveyor general of the United States for said state, the main channel of the Mississippi river was east of this island, and therefore the island became a part of the territory of said state, although since then the main channel of the river has changed, first to one side and then to the other. That, notwithstanding these facts, the complainants learned in 1899 that the state of Mississippi claimed ownership of these lands by reason of forfeitures for non-payment of the state and county taxes assessed and levied by the authorities of Bolivar county, Miss., and that under such claim the state sold them to the defendants, citizens of Mississippi, who now claim title thereto. That neither the state of Mississippi nor the county of Bolivar made any claim that said island was in that state until in 1882, after changes had been made in the main channel of the Mississippi river. That in 1892 the state of Mississippi sold the island, which it claimed to own by reason of a forfeiture for the non-payment of taxes."

It is to be seen that the question of whether or not the lands belonged to the complainants or defendants depended upon whether they were in Mississippi or Arkansas. The fact that such question was in the case, was only shown by the allegations of the bill as to the claims of the defendants, and their predecessors in interest. Such claims were that the lands were in Mississippi, and, therefore, subject to be taxed as being in that state on account of which Bolivar county, Mississippi, had undertaken to tax them and sell them for non-payment of taxes, a deed having been given to the defendants based upon such proceedings. The act of congress, of March 1st, 1817, (3 Stat. 348 C. 23 Sec. 2), established the point of beginning as follows: "Beginning on the River Mississippi, at the point where the southern boundary line of the state of Tennessee strikes the same." And beginning at the southeast corner the southerly and westerly boundaries were traced as follows: "thence west along the said degree of latitude to the Mississippi river; thence up the same to the beginning."

The Circuit Court held as a question of law that the middle of the main channel of the Mississippi River at the date of the admission of Mississippi as a state into the Union, and not the eastern bank of such river, formed the western boundary of the State of Mississippi, and therefore, the eastern boundary of the State of Arkansas, and then determined as a question of fact that at said date the middle of the main channel of such river was west, and not east, of the island which was the land in controversy, and that such island was therefore in the State of Mississippi, and the bill was dismissed. An appeal being taken to this court, objection to the jurisdiction was presented, the contention apparently being that the decision of the case depended, or might depend, upon the determination of a question of fact merely, and therefore, did not require the construction of a law of the United States. This court, Mr. Justice Holmes delivering the opinion, without noticing the fact of diversity of citizenship, held that the federal question involved in the case was sufficient to give jurisdiction, and the objection was overruled, the court saying:

> "This is a bill to quiet and remove a cloud upon the title to land alleged to be in Arkansas. The circuit court found that the land was in Mississippi and

dismissed the case for want of jurisdiction. 142 Fed. 787. The judge made the usual certificate, and an appeal was taken to this court."

"The land in controversy is Island No. 76, formerly called Chapeau island, in the Mississippi river, and whether it is part of Arkansas or of Mississippi depends, as both parties agree, on what was the western boundary of Mississippi, as established by the act of Congress admitting that state to the Union. Act of March 1, 1817, Chap. 23 (3 Stat. at L. 348). In that act the state is bounded by a line 'beginning on the river Mississippi' and running around the state 'to the Mississippi river, thence up the same to the beginning.' The plaintiffs contend that these words should be construed to bound the state on the eastern bank of the river, while the defendants maintain that they refer to the middle of the main channel, as it then was. The chief difference is upon the question of fact whether the main channel was to the east or west of the island in 1817; but as the construction of the statute also is in dispute, there is jurisdiction, and Joy v. St. Louis, 201 U. S. 332, 50 L. Ed. 776, 26 Sup. Ct. Rep. 478, cited by the appellees, does not apply."

The court then assumed, for the purpose of the decision, that the boundary is the middle of the main channel as it was in 1817, and then found as a question of fact that at that date the middle of the main channel was not west of the island as the Circuit Court had found, but was east of it, and the decision of the Circuit Court was therefore reversed without the court being in any way required to construe the act of congress referred to, or to determine any federal question. Since this court held there that a federal question arose in the case (although such question was not determined), it must have held that the allegations as to the claims of the defendants were material for it was only by reason of the allegations that the defendants claimed that the island was in Mississippi and not in Arkansas, that it was made to appear that the case was one involving a construction of the Act of Congress. As Arkansas has a statute (Section 6120 Digest, Stat. Ark. 1894), similar to said Section 6870 this court must also

have held that the existence of such a statute did not deprive the federal court of equity sitting in Arkansas of the power to entertain a bill to remove a cloud on the title of land situated in that state. The fact that the court entertained jurisdiction without a discussion of that question indicates that in the opinion of the court it was a proposition so well settled as not to require notice.

In the opinion of the lower court, in this case, the decision of this court in that case is inapplicable. Concerning that point it said:

> "The Circuit Court held that the land was in the State of Mississippi and dismissed the suit for want of jurisdiction. But whether the land was within the jurisdiction of the court or not clearly appeared from the statement of the plaintiff's claim. True the bill set forth the claim of the defendant but that added nothing to the statement of the plaintiff's claim insofar as the situs of the property was concerned. The Supreme Court held that the Circuit Court had jurisdiction because the construction of the act of congress admitting the state of Arkansas to the Union and defining its boundaries was in dispute, but as already stated, the fact that the construction of this act of congress was in dispute clearly appeared from the statement of the plaintiff's claim, and without any regard to the adverse claim asserted by the defendant."

If the statement contained in the bill in that case as to the claims of the defendant was mere surplusage, how was it made to appear from the bill that the decision of the case might require the construction of the act of congress defining the boundaries of the State of Mississippi? Not by the mere statement of the claim of the complainants because that required merely an allegation that the lands were owned by them and were situated in the State of Arkansas. It was because of the allegations as to the claims of the defendants that this court said:

> "But as the *construction of the statute* is also in dispute, there is jurisdiction."

The opinion of the court below cites as bearing on the question here: Holland v. Challen, 110 U. S., 15; Reynolds

v. Crawfordsville Bank, 112 U. S., 405; More v. Steinbach, 127 U. S., 70; Goldsmith v. Gilliland, 22 Fed. 865; California Oil & Gas Co. v. Miller, 96 Fed., 12.

Let us see what those decisions are: In Reynolds v. Crawfordsville Bank, supra, the question presented was whether a litigant can maintain in a federal court a suit based upon a statute of Indiana similar to the said statute, Section 6870. There was no question in the case as to whether or not notwithstanding such statute such litigant could maintain in such court a bill to remove a cloud. The suit which was brought was clearly one under the statute There was no attempt to allege the facts necessary to be alleged in a suit to remove a cloud independently of the statute, and there was no decision by the court as to what facts should be alleged in a suit of that character.

In Holland vs. Challen, supra, it was held that under a similar statute in Nebraska a suit could be maintained in a federal court of equity sitting in Nebraska by alleging the facts merely, which were required to be alleged under the statute, and that under such statute a suit could be maintained not only in cases where a suit to quiet title would formerly lie, but also in cases where prior to the passage of the statute a bill to remove a cloud could be maintained. The decision, however, is only that a suitor may proceed under the statute in a case where he could have brought a suit to remove a cloud. There is no intimation that a suitor may not, if he chooses, proceed exactly as he would have proceeded prior to the passage of the statute.

Concerning the case of California Oil & Gas Company vs. Miller, supra, the trial court said that the question which it had before it was there decided adversely to our contention. It is very evident that we failed to make our contention understood. What was said in the opinion in that case as to whether or not allegations as to the claims of the defendants are material or immaterial, can have no bearing here, because that was a statutory suit to quiet title. There was no allegation of the existence of any instruments constituting a cloud upon title, and no attempt to state a cause of suit for removal of a cloud.

What is said in that case concerning the effect of failure of the defendants to interpose as a defense the claims which the bill anticipates, and also concerning the proposi-

tion that jurisdiction exists when the federal question arises, and does not exist on the mere possibility that such question may arise, will be referred to under the appropriate heads.

We have been unable to discover the applicability of More vs. Steinbach, supra. The opinion in no place discusses the question of jurisdiction of the federal, circuit or district courts, or in any way refers to the question of whether or not a suit may be maintained to remove a cloud from title. The suit was one under the California statute to determine an adverse claim. The bill is in the usual form in suits of that character except that it contains the allegation unnecessary in such suits, that the adverse claim which it is alleged the defendant asserts is wholly unfounded and invalid in law, or in equity, and that its assertion depreciates the value of the complainants' title.

In Goldsmith vs. Gilliland, supra, it is stated that under Section 500 of the Oregon Code of Civil Procedure to determine an adverse claim to real property, it is not necessary to allege whether such claim casts a cloud upon title or not, or to state the nature or circumstance of the defendant's claim, but that in a suit to remove a cloud upon real property it must appear that there is such a cloud, and of what it consists, and that case therefore, supports the appellants' contention.

In the opinion of the court below it is said:

> "Jurisdiction cannot be created by anticipating the defendant's claim or by alleging that the defendant will interpose a defense arising under the constitution or laws of the United States."

There can be no possible doubt of the correctness of the foregoing statement. The court added to it, however, the following:

> "I do not understand that these general propositions are controverted by the plaintiffs, but they earnestly insist that the rule is otherwise in suits to remove a cloud."

From the statement last quoted, it is evident that the lower court was laboring under an entire misapprehension

as to our contention. The rule that jurisdiction cannot be created by anticipating a defense is of universal application applying with equal force to all suits, including suits to remove a cloud from title. The error of the learned judge who heard the motions to dismiss consists, in part, in overlooking the fact that the allegation in a bill that the defendants assert a claim is not always in *anticipation* of a claim or in anticipation of a defense. That is not a statement that the defendants will interpose such claims as a defense. In certain classes of cases, such allegation is a material and essential part of the statement of the complainant's case. If the suit is one which is only maintainable by reason of the fact that a claim is asserted, a bill which fails to contain such allegation is insufficient in that it fails to state a cause of action. In More vs. Steinbach, supra, the allegation of the bill (which allegation was deemed essential), is that the defendants claim an estate adverse to the complainants in the property described and alleged to be owned by them.

In

Northern Pacific Railway Company vs. Hauswirth, 49 Mont. 135; 140 Pac. 516,

the Supreme Court of Montana held that a complaint in an action under said Section 6870 which failed to allege that the defendant asserted a claim adverse to the plaintiff did not state a cause of action, From the opinion we quote:

> "Again, if we accept the theory of counsel that the action is one to quiet plaintiff's title under Section 6870 of the Revised Codes, we reach the same result. The complaint does not allege that the defendant asserts a claim to any portion of the right of way adverse to the plaintiff. Hence it does not state a cause of action."

How can it be held that in a suit under the statute an allegation that the defendant asserts an adverse claim is not in anticipation of a defense, and a contrary decision be made concerning a like allegation (to which is added a specific description of such claim), in a bill to remove a cloud?

Another instance in which it is necessary in order that

the jurisdiction of a federal court be invoked without diversity of citizenship is that of a suit under subdivision 16, section 629 of the Revised Statutes which provided that the Circuit Courts should have jurisdiction "of all suits authorized by law to be brought by any person to re-dress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state of any right, privilege or immunity secured by the Constitution of the United States." The cases provided for in that section are now undoubtedly covered by Subdivision 1 of Section 24 of the Act of March 3, 1911, Chap. 231, which provides that the District Court shall have original jurisdiction of all suits of a civil nature at common law, or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and arise under the constitution or laws of the United States. It has been repeatedly held that in order to state a cause of action under the said Subdivision 16, of Section 629, it was necessary that the plaintiff allege as part of his case that the defendant claimed to act under color of a statute, ordinance, etc., of a state or territory. In other words, it was necessary to allege the claim of the defendant, and such allegation was a necessary part of the plaintiff's statement of a cause of action,

> Crystal Springs Land & Water Company vs. City, 76 Fed. 148;
> City Railway Company vs. Citizens' Railway Company, 166 U. S. 577; 41 L. ed. 1114;
> Railway Company vs. Ziegler, 167 U. S. 65; 42 L. ed. 79.

In California Oil & Gas Company vs. Miller, supra, it was said that allegations as to particular claims of the defendants should be disregarded in determining the jurisdictional question for the reason that the defendants might not make the claims which the bill alleged that they made. In a case of the kind there under consideration such allegations, of course, should be disregarded, but not for the reason stated. Such allegations in the bill there considered were merely surplusage, and the case could not be affected either by the admission or denial of them.

It was suggested in the oral argument in the lower court in this case, that the defendants might, in their answer,

make different claims from those which the bill alleges that they made, and it was further suggested that in such a situation the case would not be one, or might not be one, requiring in its decision the construction of any act of congress. We cannot concur in that statement. As the allegations are material, it is, of course, necessary for the complainants to prove them, and if they fail to do so they will suffer the same consequences as for a failure to prove any other material allegation including the allegation that the matter in controversy exceeds the sum or value of $3,000. The allegation is not that the defendants, will, in their answer, make such claims. The allegation is that they do or did make such claims at the time of the commencement of the suit. That they claim under the declaratory statements of location and certificates of location annexed as exhibits to the bill, cannot very well be denied because a part of such exhibits are signed and sworn to by some of the defendants. The other specifically described claims of the defendants may be proved if necessary by the record in another case where such claims were specifically made concerning the very property here in controversy. The complainants may also prove that such claims were orally made at the time of the commencement of this suit. It is utterly immaterial, therefore, whether the defendants admit the making of such claims or set up other claims.

In the oral argument in the court below, counsel for the defendants contended that it was unnecessary to allege facts showing the invalidity of the instruments of record constituting the cloud, but that the general averment of their invalidity would be sufficient. Such a general averment would, of course, be the averment of a mere legal conclusion, and of no effect. The rule is stated in:

> Knudson v. Curley, supra;
> Walton v. Perkins, supra, and in
> 17 Ency. Pl. & Pr. 340,

as follows:

> "Thus where it is sought to remove a cloud by a bill in equity facts should be stated from which the court can draw the conclusion that the defendant's claim is a cloud. This will usually involve a statement of facts showing the apparent validity of the

instrument sought to be cancelled as a cloud, and also facts showing its real invalidity."

"A mere averment of its invalidity as a conclusion of the pleader is insufficient."

A similar averment was declared by this court to be the averment of a mere legal conclusion in:

Ritchie vs. McMullen, 159 U. S. 235, 40 L. ed. 133,

where it was held that the allegation that a judgment was an "irregular and void judgment" was insufficient. From the opinion in that case we quote as follows:

"The general averments, in the first part of the answer, that the judgment was 'an irregular and void judgment,' and, in the second part, that 'said judgment was irregular,' and 'without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action,' are but averments of legal conclusions, and wholly insufficient to impeach the judgment without specifying the grounds upon which it is supposed to be irregular and void, or without jurisdiction or authority to enter it."

This case, of course, is not affected by the fact that it is a suit against numerous defendants (twenty-one in number), asserting distinct and individual interests, and that the jurisdiction of the court, as a court of equity, is invoked partly on the ground of avoiding a multiplicity of suits. For that reason complainants would not be required to prove that they were in possession at the time of the commencement of the suit or that their possession had been long continued or that their title rests upon undisputed evidence, but they are not relieved of the necessity of alleging and proving that the instruments of record and alleged to cast clouds upon their title are in fact clouds, and that the case is one of which the court will entertain jurisdiction as a suit to remove a cloud, which requires allegations and proof of facts showing that the instruments so of record and apparently valid are in fact invalid, and that if the clouds cast are not removed that they will, or may cause injury to the complainants.

The allegations of the location of the Point Pleasant and Pleasant View Lode Claims, of the filing of the adverse suits, and of the judgments therein, and proceedings in the Land Office thereunder, are, of course, material allegations since they show the invalidity of the instruments which are alleged to constitute clouds.

IV.

IS IT NECESSARY THAT THE COMPLAINANTS, RELYING UPON THE JUDGMENTS RENDERED IN SUCH ADVERSE SUITS AS AN ABSOLUTE BAR APPEARING UPON THE FACE OF THE RECORD AGAINST ANY AND ALL OF THE CLAIMS OF THE DEFENDANTS BY VIRTUE OF LOCATIONS SUBSEQUENT TO THE ISSUANCE OF PATENT, SHOULD PLEAD SUCH JUDGMENTS AND THE PROCEEDINGS IN THE LAND OFFICE THEREUNDER?

If the suit is one to remove a cloud, such judgments, as we have already seen, may be pleaded for the purpose of showing the invalidity of the paper writings complained of as clouds. If the view of the trial court is correct and this case is not one to remove a cloud, but is a suit under the said Section 6870 to determine an adverse claim, it is still necessary for the complainants to plead such judgments in order that they may rely upon them as a bar to any adverse claim asserted by the defendants as to the land which the bill alleges that the complainants own.

Our contentions as to this point were not noticed by the lower court. The rule is well stated in

Turley v. Turley, 1 S. W. 891

(the opinion there being delivered by Judge (now Mr. Justice) Lurton, as follows:

> "It is settled that former judgments may be relied upon in the evidence, under the general issue, in trials at law. Estill v. Taul, 2 Yerg. 466; Bugg v. Norris, 4 Yerg, 327; King v. Vaughn, 8 Yerg. 60; Witcher v. Oldham, 4 Sneed, 222; Warwick v. Underwood, 3 Head, 232. This rule of pleading at law by no means

determines the rule in equity. No rule of equity procedure is better settled than that evidence relating to matters not stated in any pleading cannot be made the foundation of a decree. 'The rule requires,' says the learned editor of the fifth edition of Daniell's Chancery Practice, 'the introduction into the bill of every material fact which the plaintiff intends to prove.' 'The same rule applies to the answer and a defendant cannot avail himself of any matter in his defense which is not stated in his answer, though it appear in his evidence.' Daniell, Ch. Pr. (5th Ed.) 853."

From

Section 345, 1 Beach Mod. Eq. Pr.

we quote:

"The defense of *res adjudicata* should be pleaded either by special plea in bar or relied upon in answer. If the fact does not appear either in the bill, plea or answer, it cannot be relied upon in the evidence."

9 Encyc. Pl. & Pr. 615

contains the following:

"In equity, the defense of former adjudication, to bar a hearing on the merits, must always be set up by proper averments in the pleadings."

The rule was declared in this court as early as the case of

Crockett v. Lee, 7 Wheat. 522[5] L. ed. 513,

where, Chief Justice Marshall delivering the opinion of the court, it was held that a bill in a suit to quiet title where the chain of title of both the complainant and defendant was set out, was insufficient to support a decree on the ground that the location of the land under which the defendant claimed was insufficient because no issue as to the insufficiency of such location was tendered by the bill. Concerning the reasons for the rule of pleading declared, in the course of the opinion it was said:

"If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be direct-

ed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place."

The case of

Blandy v. Griffith, Fed. Case No. 1529

was a suit in equity to restrain the defendants from infringing certain patent rights. Prior to the filing of that suit the plaintiff had brought another suit against the defendants and had recovered damages for an infringement of the same patents. Evidence was offered on the hearing to prove such former judgment, but the same was excluded and was not admitted for the reason that such former judgment had not been pleaded. In passing upon the point, the court said:

"If the complainants desire to bring the subject before the court as matter of estoppel, the bill should have averred the judgment."

This point was passed on in the case of

Bryar v. Campbell, 177 U. S. 649; 44 L. ed. 926

and the court there said:

"The question is whether, having abandoned the original decree for a new action in the state court in which she was defeated, her heirs can now claim that the original decree in the district court, though not set up as a bar by either party, and notwithstanding the appeal, can be resuscitated after a lapse of sixteen years for the purpose of defeating the action of the state court. To state this proposition is to answer it. The state court was at liberty to proceed to dispose of the case upon the issues made by the parties, and as neither party saw fit to set up the former decree as a bar to the action, the state court was not bound to notice it."

See also

Gerber v. Gerber, 40 N. E. 581;
Evans v. Woodsworth, 72 N. E. 1082;
Mettler v. Warner, 90 N. E. 1099.

The case is not affected by the fact that it is possible for the defendants to assert a claim to the property in question not based upon any locations made subsequent to the issuance of patent. In that event the judgments would not operate as a bar as against such claims, since the effect of the judgments is only to bar the assertion of any claim to the land in controversy based on a location made subsequent to the issuance of patent. It is, however, open to the defendant in any case where a judgment is pleaded to avoid the bar of the judgment pleaded if he can, and if the complainants here relied upon the judgments as a bar to any defenses which the defendants might make in support of an adverse claim to the property in question, it was incumbent on them to plead them. The question is in this case, therefore, as to whether the allegations concerning such judgments and the proceedings in the land office thereunder, are sufficient to show that the case is one arising under the laws of the United States, regardless of whether the case be considered as one to remove a cloud from title or a statutory suit to determine an adverse claim.

ARE THE ALLEGATIONS OF THE BILL, INCLUDING THE SPECIFIC STATEMENT OF THE CLAIMS MADE BY THE DEFENDANTS, AND THE ALLEGATIONS AS TO THE RECOVERY OF THE SAID JUDGMENTS, AND THE PROCEEDINGS IN THE LAND OFFICE THEREUNDER, SUFFICIENT TO SHOW THAT THE CASE IS ONE ARISING UNDER THE LAWS OF THE UNITED STATES?

Under the rules established by the foregoing authorities all of the allegations of the bill set forth in the statement of the case herein are necessary. As the invalidity of the paper writings of record must be shown, all of the allegations specifying the claims of the defendants are necessary. An allegation, for instance, that there were no veins known to exist within the Butte & Boston placer at the date of the application for patent, would be meaningless without the further allegation that the defendants claimed that such known existence of such leads, rendered the ground subject to location and enabled them to make a valid lode location on it. So with respect to the allegations relating to width of area of surface ground on each side of the lead,

and length along the strike of the lead, which might be located, assuming that a vein was known to exist at such date. Complainants must have the right to show that each of such locations is in part invalid even though the known existence of such a lead should be established. Any allegation in that respect would be unintelligible without appropriate allegations showing that complainants hold under a placer patent; that defendant's lode locations are made within the boundaries thereof; that such locations have a length and breadth of 1500 feet and 600 feet, respectively, and that defendants claim the full extent of the ground located.

It remains to point out the particular laws of the United States, the construction of which is, or may be required by the decision of the case.

If the defendants should not file an answer in the case and the allegations of the bill should be thereby admitted, the case would be in the same condition, of course, so far as the question of jurisdiction is concerned, as it would if they should file an answer denying all of the allegations of the bill, excepting the allegations as to the claims made by them, such allegations being admitted, proof was made by complainants of all allegations not admitted, and defendants produced no evidence.

If the defendants should file an answer denying that they make any claim under such locations, but should allege that they make claim to the ground based upon some other proceedings, as for instance, purchase at a tax sale, such allegation would not, assuming that our contention that this suit is solely one to remove a cloud is correct, be responsive to the bill, and in any event would not be sufficient to show that the instruments of record constituting the clouds should not be cancelled, and the case viewed in its jurisdictional aspect would be the same as in the situation considered above.

Consideration of the question of jurisdiction in a case under the said Subdivision 16, of said Section 629, as it would be presented if, in such a case, no answer be filed and proof be made of the allegations of the bill only, or if answer be filed denying that the defendant made the claims alleged, and alleging that he made other claims, but not under any state statute, or ordinance, will help in solving the jurisdictional question in this case. In the cases sup-

posed under said Section 629, the court, no doubt, would not be held to have lost jurisdiction, but whether that is so or not cannot affect the jurisdiction which the court has at the commencement of the suit. In a case under the said Subdivision 16, of said Section 629, it would be necessary, as we have already seen, that the plaintiff in order that he state a case, allege that the defendant claimed to act under color of a statute, ordinance, etc., of a state or territory. Because of the possibility of defendant denying in his answer that he claimed to act under any statute or ordinance it could not be held that the case was not one arising under the laws of the United States, and the same rule applies to this case.

As we have undertaken to show that the lower court had jurisdiction even though the suit were held to be one to determine an adverse claim under the statute, we will consider the case here in the aspect which it would assume if it should be held that the suit is of that character. If the suit is one to determine an adverse claim merely, the case would be determined upon such affirmative allegations of the answer, the burden of proving them being on the defendant, but the jurisdiction of the court would still be maintainable as one arising under the laws of the United States because of the allegation as to such judgments, the question as to the effect of such judgments being held to have arisen in the case, though the case might not be decided upon them.

If the defendants should answer admitting that they make the claims which the bill alleges under the paper writings set forth in the bill, the case might be decided solely upon a question of fact. For instance, the court might decide as a question of fact that the Point Pleasant and Pleasant View lode claims were never in fact located, and further that at the date of the placer application there was no vein or lode known to exist within the ground in controversy. The court, however, might, with equal propriety, pass the question of whether the Point Pleasant and Pleasant View locations were located, and consider the question of whether or not, if they were located and continued in force up to and including the date of the issuance of patent, they could not nevertheless have the effect of rendering the patent invalid as to the land in conflict because of the judgments in the adverse suits, and the proceedings in the land office thereunder.

The appellants contend that the effect of the judgments in the adverse suits is such that it must be held regardless of what the facts actually are that the Point Pleasant and Pleasant View lode claims were void ab initio. Appellants also contend that because of said judgments it must, under the law, and irrespective of what the facts are, be held that no vein or veins were known to exist within the ground in controversy at the date of the placer application.

Such contentions are based on the provision of

Sec. 2326, R. S. U. S.,

which is as follows:

> "Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that

several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever."

Under the provisions of this section, upon the recovery of such judgments and the filing of a certified copy of the judgment rolls in the local land office, the proceedings are required to be certified by the register to the commissioner of the general land office "and a patent shall issue thereon for the claim or such portion thereof as the applicant *shall appear from the decision of the court* to rightly possess." Since by such statute it was made the duty of the register to file the proceedings with the commissioner of the general land office upon the filing of such certified copy of the judgment rolls, and it was in like manner made the duty of the commissioner to order patent to issue when they were filed, the law in other respects being complied with, it cannot be held that the existence of prior lode locations which had been made the basis of the adverse claims then presented any obstacle to the issuance of patent. Now it appears from allegations which we have shown are a proper part of the bill that the court, when it comes to consider the case finally must (if it does not decide as a question of fact that there was no valid Point Pleasant or Pleasant View lode location) determine such contentions, and in doing so the court must construe the said Section 2326. Whether our contention is good or bad, depends upon the interpretation given to the language of that statute. The same contentions were made in the Circuit Court of Appeals in the case of

Mason v. Washington-Butte Mining Co., 214 Fed. 32.

That court passed upon the question, and in doing so found it necessary to determine the meaning of the said Sec-

tion 2326 as appears from the following extract from the opinion.

"We are of the opinion also that both the lode locations were rendered void ab initio so far as they included any of the land in controversy, by the judgment in the adverse proceedings. Section 2326 of the Revised Statutes, under which the adverse proceedings was had, requires the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and declares that his failure to do so shall be a waiver of his adverse claim, and that after judgment the whole proceeding and the judgment shall be certified by the register to the commissioner of the general land office, and the statute provides that a patent shall issue thereon for the claim 'or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.' There is no question here involving the doctrine established by Belk v. Meagher, 104 U. S. 279, Noyes v. Mantle, 127 U. S. 348, Brown v. Gurney, 201 U. S. 184, and Farrell v. Lockhart, 210 U. S. 142, to the effect that mineral ground covered by a valid location is, during the life of the location, segregated and not open to location by another, and that until a location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon, with a view to the relocation of the same. In Duffield v. San Francisco Chemical Co., 205 Fed. 480, we said 'By these statutes there was relegated to a court the jurisdiction to determine the right of possession between the adverse claimants. The determination of that question necessarily involves, not only the question which of the adverse claimaints was prior in time in making location; and whether the location was made in compliance with the law, but also, the question whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired.' In Iron & Silver Min. Co. v. Campbell, 135 U. S. 206, the court said that the result of the judicial investigation 'shall govern the action of the officers of the land department in determining which of these claimants shall have the patent,

> the final evidence of title, from the government.' And in Mining Co. v. Tunnel Co. 196 U. S. 337, 357, the court said that the decision of a conflict between two mining claimants is 'a decision which will enable the land department without further investigation to issue a patent for the land.' "

If the court should, upon any ground, hold that the placer patent was not rendered invalid as to the ground in conflict by reason of such prior locations, it would then be called upon to pass on the question of whether a vein was, or veins were known to exist within the limits of the Butte & Boston placer at or prior to the date of the placer application. The question could be disposed of by the court by assuming that such veins were known to exist, but that the defendants were barred from asserting their known existence on account of said judgments in the adverse suits. The determination of that question would require the construction of said Section 2326. As to this point the contention of the appellants is that between the parties to the said judgments it was conclusively determined that there was no such known vein, since the determination of the right of possession between these adverse claimants necessarily involved the question of whether the land occupied and covered by such respective locations was subject to location in the manner in which it was attempted to be acquired,

Mason v. Washington-Butte Mng. Co., supra.,

and that while the United States was not a party appearing upon the face of the record, under the provisions of the said Sec. 2326, the United States has consented to be bound by such judgment as to all questions which are determined by it. Patent may be withheld after the recovery of such judgment by failure on the part of the applicant for it to comply with the law in other respects, but such patent may not be withheld from the applicant upon the ground that as between the adverse claimants the one against whom judgment was rendered was, as a matter of fact, entitled to the land. To that extent therefore the United States was bound by the judgment and in a sense was a party to it, since it is only those who are parties and privies who are so bound. Now since the United States was a party to the said judg-

ment the defendants in this suit are also bound, since if they have any rights, the same were obtained from the United States.

Upon this contention if the court shall decide against us, it must, in doing so, hold that by the terms of the said Sec. 2326, the United States is not such a party, in other words, in passing on the point, the court must construe the said law of the United States. That the decision of the point requires a construction of said section appears from the decision in the case of

> Butte Land & Investment Co. v. Merriman, 32 Mont. 402; 80 Pac. 675,

a portion of the opinion in that case being as follows:

> "Sec. 2326, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1430), which makes provision for the proceedings to be had in case an adverse claim be filed to an application for patent, among other things provides: 'It shall be the duty of the adverse claimant, within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.' This is the only provision under which the government has agreed to be bound by the judgment of a state court, if at all, and to what extent has it done so in this instance? It has

said, in language which is free from ambiguity, that for the purpose of determining which, if either, of two claimants is entitled to possession of the ground in controversy, it will relegate them to the local courts, where such questions may be determined, and that the government will accept the judgment as conclusive, as between the parties to it, of the right of the prevailing party to assert his claim before the land department."

Of course decisions to the effect that a mere question of whether or not effect should be given to a judgment and other like questions plainly are not sufficient to give jurisdiction because the decision of such question does not involve the construction of any law of the United States. It depends on general principles of law, and further the answers to such questions are so obvious that they cannot be considered substantial questions. Of like character, are decisions to the effect that the question of whether or not a judgment duly rendered by a court of competent jurisdiction and having jurisdiction of the subject matter and of the parties, is binding upon the parties to such judgment. Those cases are substantially different from the case here. The Circuit Court of Appeals, for the Ninth Circuit, in the case of Mason v. Washington-Butte Mining Company, supra, held that the judgments in the adverse suits were conclusive of the question of whether or not the prior locations were valid at the date of the issuance of patent, not only upon the parties to such judgments, but also on the defendants in that suit, they being in part the same persons who are appellees here. The supreme court of Montana in the case of Butte Land & Investment Company v. Mason, supra, held that such judgments were not conclusive on the question of the known existence of veins within such ground as against the defendants in that suit, (they being in part the said appellees), for the reason that such defendants were not parties to the adverse suits. If both of these decisions are correct the question still remains to be determined why the judgment in one case is conclusive as to persons who were not parties to the judgment and is not conclusive in the other case. The question which this case presents is not whether a judgment is binding as against those who are parties to it, and those in privity with

such parties, but whether the United States was in any respect, or as to any question, bound by the said judgments, and, if so, whether it was, or was not, in any sense, a party to such judgments.

Should the court, when it comes to consider any of these questions, decide against the contention of the appellants, it will nevertheless be called upon, in doing so, to construe the said statute. If the court should hold that the Butte & Boston placer is not invalid as to the ground in conflict and that a vein was, or veins were, known to exist within the limits of the Butte & Boston placer at the date of the said application for patent, and that the said judgments do not constitute a bar to the assertion of the existence of such known veins, it would then be called upon to determine the further question of the extent of surface ground on each side of such vein which could be embraced in a lode location, and whether any portion of the vein along its strike could be located which had not been actually exposed at the date of the application for placer patents, and in determining such questions must construe certain statutes of the United States.

Sec. 2333, R. S. U. S.

is as follows:

> "Sec. 2333. Where the same person, association, or corporation is in possession of a placer claim and also a vein or lode included within the boundaries thereof application shall be made for patent for the placer claim with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for patent for such placer claim which does not include an application for the vein or lode

claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

That a determination of the limit of such width of such location involves a construction of said section, appears from a portion of the opinion in

Mt. Rosa M. M. & L. Co. v. Palmer, 26 Colo. 56; 56 Pac. 176

(where it was held that the width of such location could not exceed fifty feet) as follows:

"We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing, and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section, is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take twenty-five feet on each side of the center of the vein, and pay therefor at the rate of five dollars per acre. This is a privilege accorded to him, which he may avail himself of, or not, as he sees fit. If he elects to waive this privilege, he may do so in one of two ways—either by expressly excepting the lode from his placer location and application for patent, or remaining silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode and by such silence is bound to the same extent, and in the same manner, but no further, than he would have been by any express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming for placer purposes, the greatest possible area within the boundaries of his placer claim, and should be held to have relinquished

only that which he might have taken, which is the lode, with the amount of surface ground provided."

And from the opinion in

South Butte Mng. Co. v. B. & V. Mng. Co., on file in the lower court,

(where it was held that the limit of the width of such location is fifty feet plus the width between the walls of the vein located) as follows:

"The decree in this case is erroneous, and is hereby ordered set aside and vacated.

"I still think, however, that the defendants must prevail generally, but the extent to which their rights should be upheld must be limited. Under Sec. 2333 R. S. U. S. they can only take a decree for the lode referred to in the memorandum opinion as having a southeast, northwest strike and a southerly dip, and which was well known to exist prior to October 21, 1881; and for twenty-five feet of surface on each side thereof.

"But to define the lode with satisfactory precision is, I think, impossible under the evidence; and as the surface to belong to the defendants can only be described after the lode is defined, it becomes equally impossible to define the surface area with accuracy.

"The burden of proving the right to the lode having been put upon the defendants as lode claimants, it is still upon them to prove the size or extent and strike of their lode with a definiteness sufficient to enable the court to describe the lode in order to define the surface, for it is only the lode, and 25 feet of surface on each side of the lode that they are entitled to."

Our contention that only that portion of a vein which is actually exposed can be held to be known to exist and is therefore subject to location, is based upon the provisions of the said Sec. 2333, and is that since under the said section the applicant for patent may cover the vein or lode known to exist by a claim and include in his application an application for patent for it, and if he does so, is required to pay for it at the rate of $5 per acre, but it is only veins or lodes known to exist which may be included, and it is only to the

extent that they are known that they can be paid for, by his failure to include such application in his application for patent he can only be held to have lost that which he might have included, and therefore, it is only so much of the vein as was exposed and capable of measurement at the date of the application that may be held to be still subject to location.

Our contention is supported by the dissenting opinion of Mr. Justice Field in

> Iron S. M. Co. vs. Mike & Starr Co., 143 U. S. 394; 36 L. Ed. 201,

the following extract from which shows that the decision of such question requires the construction of said section:

> "And to embrace the lode within the patent of a placer claim the applicant must, if it be known, pay for it at the rate of five dollars per acre. But he cannot pay any sum, or offer to pay so as to be effectual, until he can ascertain the number of acres contained in the lode claim desired, that is, until the ground can be measured. Nor could the officers of the land department accept any sum from the applicant until such measurement, upon a mere speculative opinion as to the extent of the supposed lode."

ARE SUCH QUESTIONS SUBSTANTIAL AND ARE THEY QUESTIONS WHICH HAVE NOT BEEN DECIDED BY THIS COURT?

The statutes which must be looked to as determining such questions are not so plain and clear as to not require construction. The decision must depend on inferences to be drawn from the provisions of such statutes. The questions are such that members of the bar, learned in the law, may honestly differ as to the proper construction to be given. The arguments made in the two cases, Mason vs. Washington-Butte Mining Company, supra, and Butte Land & Investment Company vs. Mason, supra, appear in the reports of those cases. As to the limit of the width of a lode location which may be made upon ground patented as placer the Supreme Court of Colorado in the case of Mt. Roza Mining & Milling Company vs. Palmer, supra, and the United States Circuit Court, for the District of Montana, in the case of South Butte Mining Company vs. B. &

V. C. M. Co., supra, rendered contrary decisions, one holding that the limit of the width of such location was fifty feet, and the other holding that the limit was fifty feet plus the width of the vein.

None of these questions has been directly passed upon by this court.

DOES THE DECISION OF THE CASE INVOLVE A FEDERAL QUESTION, IF UPON THE FEDERAL QUESTION THE DECISION SHOULD BE AGAINST THE CONTENTION OF THE COMPLAINANTS?

Before the court can decide against us as to any of our contentions as to the effect to be given to any federal statute, it must construe such statutes and in doing so must determine a federal question.

Pacific Electric Ry. Co. vs. Los Angeles, 194 U. S. 112; 48 L. ed. 896;
Siler vs. Railroad Co., 213 U. S. 175; 53 L. ed. 753;
Home Telephone & Telegraph Co. vs. Los Angeles, 227 U. S. 278; 57 L. ed. 510;
Hamilton Gaslight Etc. Co. vs. City, 146 U. S. 258; 36 L. ed. 963;
Raymond vs. Chicago Union Traction Co., 207 U. S. 20; 52 L. ed. 78;
Williamson vs. U. S., 207 U. S. 425; 52 L. ed. 278;
People's Savings Bank vs. Layman, 134 Fed. 635;
Michigan Railroad Tax Cases, 138 Fed 223;
Horner vs. U. S., 143 U. S. 570; 36 L. ed. 266;
Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S. 685; 42 L. ed. 626.

From

Pac. Elec. Ry. Co. vs. Los Angeles, supra,

we quote the following:

"But, however, presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out. City Ry. Co. v. Citizen's Street R. Co., 166 U. S. 557; 41 L. ed. 1114; 17 Sup. Ct. Rep. 653. Nor upon the actual

sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient; a substantial controversy must be presented."

DOES THE DECISION OF THE CASE INVOLVE A FEDERAL QUESTION, SINCE THE CASE MAY BE DECIDED UPON QUESTIONS OF FACT ALONE?

Since it appears that there are certain federal questions in the case on which, according to the allegations of the bill, the decision of the case may be based, and the decision of such federal question would be effectual to entirely dispose of the case, it must be held that the case involves the decision of federal questions. In order that it may be so held it is only necessary that in any aspect which the case may assume the decision of a federal question is necessary. From the opinion of Chief Justice Marshall in the leading case of

Osborne vs. Bank, 9 Wheat. 740; 6 L. ed. 204,

we quote the following:

"We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings."

From the opinion in

St. Paul M. & M. Co. vs. Railway Co., 68 Fed. 2,

we quote the following:

"It is proper to observe in this connection that we are not concerned at present with the merits of the several propositions heretofore stated on which the plaintiff bases its claim that the deeds executed by the governor were void, and conveyed no title to the lands situated north of Watab. Whether the construction that is placed on the granting acts by the plaintiff company with a view of impeaching the conveyances is sound or unsound, we need not stop at this point to inquire, because the jurisdiction of the circuit court does not depend on that inquiry. If it appears, in any aspect which the case may assume, that the right of recovery may depend upon a construction of those acts, and if the right to recover so far as it turns on the construction of federal statutes is not merely a colorable claim, but rests upon a reasonable foundation, then a federal question is involved which is adequate to confer jurisdiction."

In the case of

Home Telephone & Telegraph Co. vs. Los Angeles, 227 U. S. 278,

and in

Siler vs. Railroad Company, 213 U. S. 174,

it was held that jurisdiction of the United States Circuit Court which was invoked on the ground that it was shown by the bill that certain acts of the defendant which the complainant complained of deprived the complainant of certain rights guaranteed to him by the constitution of the United States, was not defeated by the fact that it was also alleged in the bill that such acts were in violation of the constitution of the state. From the opinion in the second of the two cases last cited, we quote the following:

"The federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

"This court has the same right, and can, if it deem

it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit."

In

Nashville vs. Cooper, 6 Wall 247, 18 L. ed. 851,

the court in passing on the questions of jurisdiction said:

"Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

The following pertinent remarks are from the opinion in:

New Orleans vs. Mississippi, 102 U. S. 135; 26 L. ed. 96.

"It is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Moore vs. McGuire, supra, as we have already seen, was decided solely upon a question of fact, and it was nevertheless held that the case was one of which the court had jurisdiction as arising under the laws of the United States.

See also:

Tennessee vs. Davis, 100 U. S. 257; 25 L. ed. 648;

St. Louis I. M. & S. Ry. Co. vs. Davis, 132 Fed. 629;

Williamson vs. U. S., 207 U. S. 425; 52 L. ed. 278.

In California Oil & Gas Company vs. Miller, supra, it was said that "the possibility, or even probability that a federal question may arise during the progress of the case will not

support an original jurisdiction in the Circuit Court, but the plaintiff's statement of his own claim must show that such a question is necessarily involved and must be determined." This statement is undoubtedly correct to the extent that it is not sufficient that a federal question may arise. Such question must arise, otherwise the court has not jurisdiction. If the case is one which in any aspect it may assume, it will necessarily involve the decision of a federal question, the case is one which in fact arises under the laws of the United States, although such federal question may not be decided. That must be considered as having been conclusively determined by the decisions of this court cited above. The statement, therefore, last quoted to the effect that such question must be determined, is therefore, plainly contrary to the decision of this court.

VI.

DID THE LOWER COURT HAVE JURISDICTION?

From the foregoing it appears that the authority vested in the courts of the United States to entertain jurisdiction in a case can in no way be limited by a statute of a state; that the legislature of Montana in passing the said Section 6870 has in no way undertaken to limit the power of the federal courts of equity, sitting in Montana, to entertain jurisdiction in a suit to remove a cloud from title, the same facts being alleged as were necessary prior to the passage of such statute; that in a suit to remove a cloud from title it is necessary to show that a cloud exists and that that involves a statement of the facts showing that the cloud complained of is in fact invalid, and that if left outstanding, injury is threatened to the complainant, which statement ordinarily involves a specific description of the claims made by the defendants under the instrument constituting the cloud; that all of such allegations are a necessary part of the statement of complainants' cause of suit; that such allegations, if they show that the decision of the case involves the construction of a federal statute, are sufficient to show that jurisdiction exists; that in equity suits it is incumbent on the pleader who relies upon a judgment as a bar or as creating an estoppel to plead such judgment;

that all of such propositions are sustained by decisions squarely in point, and of the highest authority; that the averments of the bill other than the allegations concerning said judgments show that the case is one which involves in its decision the determination of certain federal questions; that the judgments pleaded in this case show that the determination of the question of whether they constitute a bar as against the assertion of any claim of the defendants based upon a location made subsequent to the issuance of patent for the land in question requires the construction of a statute of the United States, and are sufficient to show the existence of jurisdiction, whether the case is one to remove cloud or is a statutory suit to quiet title.

We submit, therefore, that the case must be held to be one arising under the laws of the United States, and that the decree of the court below dismissing the case on the ground that it did not have jurisdiction, is erroneous, and should be reversed.

Respectfully submitted,

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,
D. M. KELLY,
Solicitors for Appellant,
Anaconda Copper Mining Co.

J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Appellant,
Washington-Butte Mining Co.

H. C. HOPKINS and
JOHN A. SHELTON,
Solicitors for Appellant,
Olivia H. Hopkins.

FILED
DEC. 8 1915
JAMES D. MAHER
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 284

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, MERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

REPLY BRIEF OF APPELLANTS.

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,
D. M. KELLY,
Solicitors for Appellant Anaconda Copper Mining Company.

J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Appellant Washington-Butte Mining Company.

H. C. HOPKINS AND
JOHN A. SHELTON,
Solicitors for Appellant Olivia H. Hopkins.

(No. 24,900)

INDEX.

	Page
Under the statutes of Montana may a suit be maintained to remove a cloud from title?	1
Does the bill here contain the appropriate allegations in a suit to remove a cloud?	7
Must the Federal question necessarily appear from the plaintiff's statement of his own claim?	9
Does it appear from the necessary allegations of the bill that the decision of the case may require a determination of the extent of the area of surface ground which may be embraced in a lode location made within the limits of ground patented as placer?	10
Since the bill alleges that no vein or lode, within the meaning of the terms as used in section 2333, R. S. U. S., was known to exist within the Butte & Boston Placer Mining Claim at the date of application for patent, does it necessarily follow that appellees, in a suit brought by them to recover possession of the land embraced within their lode locations, must "inevitably" show such fact?	14
Are certificates of lode locations, under the Montana law, such instruments as will support a suit for their removal as clouds upon title?	17
Does the bill show that the question of the extent of the conclusiveness of the judgments rendered in the adverse suits requires the determination of a Federal question?	26

Table of Cases.

Acord *vs.* Western Pocahontas Corporation, 156 Fed., 989	25
2 Black on Judgments, sec. 613	33
Castro *vs* Barry, 79 Cal., 443	3
32 Cyc., 1315	15
32 Cyc., 1314	17
32 Cyc., 1319 to 1321	24
Cheesman *vs.* Shreeve, 40 Fed., 787	24
Cheesman *vs.* Hart, 42 Fed., 98	24
Crystal Springs Land & Water Co. *vs.* City of Los Angeles, 76 Fed., 148	9
City Railway Co. *vs.* Citizens' Ry. Co., 166 U. S., 557	9

	Page
Columbia Valley Ry. Co. *vs.* P. & S. Ry. Co., 162 Fed., 603	9
Cooke *vs.* Avery, 147 U. S., 375; 37 L. Ed., 209	9
10 Enc. U. S. Supreme Court Reports, 738	4
10 Enc. U. S. Supreme Court Reports, 769	34
Hicks *vs.* Rupp, 140 Pac., 97	3
3 Lindley on Mines, 3d ed., sec. 773	17
3 Lindley on Mines, 3d ed., sec. 754	32
Last Chance Mining Co. *vs.* Tyler Mining Co., 157 U. S., 683; 39 L. Ed., 859	34
Mason *vs.* Washington-Butte Mining Co., 214 Fed., 32	15
Merk *vs.* Bowery Mng. Co., 31 Mont., 298; 78 Pac., 519	4
Moore *vs.* McGuire, 205 U. S., 214	5
Nelson *vs.* Great Northern Ry. Co., 28 Mont., 297; 78 Pac., 642	3
Northern Pacific Railway Co. *vs.* Slaght, 205 U. S., 134; 51 L. Ed., 742	37
Pixley *vs.* Huggins, 15 Cal., 128	23
Railway Co. *vs.* Los Angeles, 194 U. S., 112; 48 L. Ed., 896	9
Railway Co. *vs.* Ziegler, 167 U. S., 65	9
Simmons *vs.* Carlton, 33 So., 408	15
Stokes *vs.* Houghton, 45 N. Y. S., 21	22
Sheets *vs.* Prosser, 112 N. W., 72	24
Thomas *vs.* South Butte Mining Co., 211 Fed., 105	24
Vogel *vs.* Warsing, 146 Fed., 949	24
Wilson *vs.* Freeman, 29 Mont., 470; 75 Pac., 84	29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 617.

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LEROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHEL MERRIMAN, MERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

REPLY BRIEF OF APPELLANTS.

I. Under the Statutes of Montana May a Suit be Maintained to Remove Cloud from Title?

The argument of the appellees makes it necessary to again refer to a subject which is discussed to some extent in our brief in chief. The substance

Im

of appellees' argument is that a suit to remove a cloud from title is for all practical purposes the equivalent of a suit brought to determine an adverse claim, under section 6870, Revised Codes of Montana of 1907, and that, therefore, the right to maintain a suit to remove a cloud from title, as it originally existed under the chancery practice, has become merged in the statutory remedy afforded by the said section 6870.

The most serious flaw in the argument of the appellees upon this point is that it ignores the existence of two other sections of the Revised Codes of Montana, to wit, sections 6115-6116, which sections, according to the construction placed on them by the Supreme Court of California, from which State Montana borrowed them, and by the Supreme Court of Montana, in a recent case, expressly provide for suits to remove clouds from title of the same character as was maintainable prior to the adoption of the said section 6870. These sections of the statute are set forth in our brief in chief, on page 5, and provide that a written instrument, in respect to which there is a reasonable apprehension that if left outstanding may cause serious injury, may be adjudged to be void and may be canceled, but that an instrument void upon its face, or upon the face of another instrument necessary to the use of the former in evidence, it is not to be deemed capable of causing such injury.

These sections of the statute appear as sections 3412-3413 of the Civil Code of California, Montana having adopted said sections in 1895 and made them a part of her statutory law by enacting them as sections 4450-4451 of the Civil Code of Montana of 1895. Before such sections had been copied into the statute of Montana, they had been,

on June 11, 1889, construed by the Supreme Court of California, in the case of

Castro *vs.* Barry, 79 Cal., 443,

where, concerning them, it was said:

> "This provision is the embodiment in statutory form of an old and well-settled rule of equity. And as a matter of course, in order to obtain the relief it is necessary that the complaint should state a case within the rule. In the language of Sanderson, J., in Hibernia S. & L. Soc. *vs.* Ordway, 38 Cal., 681, 'In an action to remove a cloud, there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated.' "

Since Montana adopted this statute, as so construed, the decision of the Supreme Court of California last cited is of equal force with a like decision by the Supreme Court of Montana.

Nelson *vs.* Great Northern Ry. Co., 28 Mont., 297; 72 Pac., 642.

The Supreme Court of Montana, in a recent case (March 28, 1914),

Hicks *vs.* Rupp, 140 Pac., 97,

cited in our brief in chief, expressly declared that the said sections 6115-6116 defined the rule under which the jurisdiction of the court, as a court of equity to remove a cloud may be invoked, and that in an action to obtain the relief which this statute affords it is necessary to allege the facts which show the apparent validity of the instrument which

is said to constitute the cloud, and also the facts showing its invalidity.

The case of—

> Merk *vs.* Bowery Mining Co., 31 Mont., 298; 78 Pac., 519,

was a suit for the removal of a cloud and for the quieting of title. The Supreme Court of Montana, in deciding the case, said that the complaint stated facts sufficient to constitute a cause of action in a suit to remove a cloud, and upon this point cited Wiard *vs.* Brown, 59 Cal., 194, which latter case is cited in our brief in chief, on page 12. An extract there copied from the opinion in that case is to the effect that in the opinion of the court the relief afforded under the statute, section 6115, is the same as was afforded under the equity practice at common law, by way of removal of a cloud from title, and it is clear, therefore, that the statement of the court in Merk *vs.* Bowery Mining Co., *supra,* that the complaint there considered stated facts sufficient in an action to remove a cloud meant that facts were alleged in the complaint showing the actual invalidity as well as the apparent validity of the instrument which was said to constitute the cloud.

The court also said that the complaint in that case stated facts sufficient to determine an adverse claim. We quote from the opinion in that case as follows:

> "An examination of the complaint discloses that it was filed to quiet plaintiffs' title to the premises in controversy, to remove a cloud therefrom by cancellation of instruments which they say have no validity, and incidentally for an injunction against the prosecution of two suits against them

by the Bowery Mining Company for forcible entry and detainer and one for conversion of personal property. There is no doubt but the allegations of the complaint are sufficient as an action to remove a cloud from plaintiffs' title and cancel the contracts of August 15, 1899, and May 9, 1900, to Berkin, under section 4450 of the Civil Code. Wiard *vs.* Brown, 59 Cal., 194; Angus *vs.* Craven, 132 Cal., 691; 64 Pac., 1901. We are of the opinion that it is also sufficient to warrant a decree quieting title of plaintiffs against the adverse claim of the Bowery Mining Company. The complaint alleges that this company is assignee of the Berkin contract, and claims rights thereunder adverse to plaintiff; but it asks in the prayer that defendants 'set forth the nature of their adverse claims, and that the same may be adjudged void.' "

The appellees do not deny that the decision of the Supreme Court of Montana construing the statutes under consideration should, in this case, be deemed of controlling force, or that the decision of this court in—

Moore *vs.* McGuire, 205 U. S., 214,

(cited in our brief in chief, page 25) is not conclusive upon this point. Without any answer on the part of the appellees to our contention as to the effect which should be given to said sections 6115-6116, to the decisions of California and Montana construing the same, and to the decision of this court in the case cited, it is unnecessary to follow at great length the argument of the appellees in support of their contention that under modern statutory enactments the distinction between a suit

under the statute to determine an adverse claim to real property and a suit to remove a cloud from the title of real property is of no practical, but only of an historical, interest.

Appellees say that under the old equity practice a suit to remove a cloud was not maintainable if the instrument sought to be canceled as a cloud was void on its face, or that such suit was not maintainable to secure relief against a mere verbal claim, and that no such suit was maintainable unless the facts showing the actual invalidity as well as the apparent validity of the instrument sought to be canceled as a cloud were specifically alleged, but that under the enlarged equitable powers exercised under said section 6870 the rule is otherwise.

It is true that in a complaint drawn to secure the relief afforded by the said section 6870 it is unnecessary in order that such suit may be maintained that such conditions should exist or that such facts should be alleged. That in a suit in Montana to remove a cloud the rule is otherwise, is entirely clear, because said sections 6115-6116 expressly declare that a suit to remove a cloud from title is not maintainable if the instrument, the removal of which as a cloud is sought, is invalid upon its face, and that such relief is afforded only in respect to written instruments, while the Supreme Court of Montana in Hicks *vs.* Rupp, *supra*, has declared that in suits to remove clouds from title it is necessary to allege specifically the facts showing the actual invalidity as well as the apparent validity of the instrument complained of as casting a cloud.

II. Does the Bill Here Contain the Appropriate Allegations in a Suit to Remove a Cloud?

The appellees say that if it is necessary or permissible, in a suit to remove a cloud from title, to allege the facts showing the actual invalidity as well as the apparent validity of the instrument complained of as casting a cloud, the allegations of the bill in this case show the suit to be of that character, except that it contains the allegation "that said defendants have not, and none of them has, any right, title or interest, either at law or in equity, in or to said lands or any part thereof;" and contains a prayer that the title of the complainants be quieted.

But we submit that the allegation that the defendants have no right, title or interest in the lands in question, which follows the allegation of facts showing the actual invalidity of their claims to the same, is a mere general conclusion added to such specific allegation of fact. In a suit to remove a cloud such allegation is, at most, only superfluous. In a suit under the statute to determine an adverse claim such allegation is entirely superfluous, and to the cases to that effect, cited on page 13 of our brief in chief, may be added:

Merk *vs.* Bowery Mining Co., *supra.*

Such allegation, therefore, in no way leads to the conclusion that the complainants have chosen to pursue the remedy afforded by the said section 6870, rather than that afforded by said sections 6115-6116.

The prayer of the bill may be looked to, no doubt, for the purpose of determining the theory upon which the complainants have proceeded. The prayer is that a decree be entered "that the cloud

caused by the recording of the said declaratory statements of location and certificates of location in the office of the county clerk and recorder of Silver Bow County, Montana, and each and all of them, be removed, and the same decreed to be no cloud upon the title of the complainants in and to the said premises."

The relief sought shows that the complainants filed their bill for the purpose of procuring the removal of such clouds, and it is immaterial that they have also asked that their title be quieted.

If the allegations of the bill and the prayer were sufficient to entitle the complainants to relief under both the said section 6870 and the said sections 6115-6116, the suit would not on that account be any less a suit to remove a cloud, and the appropriate allegations of a suit of that character would be sufficient, if they showed the existence of a Federal question, to give jurisdiction without regard to diversity of citizenship.

In—

Merk *vs.* Bowery Mining Co., *supra,*

the complaint was held sufficient to constitute a cause of action under the said sections 6115-6116, as well as said section 6870, and in—

Moore *vs.* McGuire, *supra,*

it was held that the suit was one to remove a cloud as well as a suit to quiet title, and the allegations of the bill in that case, for the purpose of showing the actual invalidity of the deeds under which the defendants claimed, were held to be sufficient to show that the case required the construction of an act of Congress.

III. Must the Federal Question Necessarily Appear from the Plaintiff's Statement of His Own Claim?

By placing certain words in italics. in phrases quoted from cases where there was a futile attempt to show the existence of a Federal question, by anticipating defenses which would or might be interposed, the appellees intimate, rather than expressly declare, that the question asked above should be answered in the affirmative. The statement of the law in any case must be interpreted with reference to the facts there under consideration. In order to obtain an answer to the question propounded above, it is necessary, therefore, to go to cases where, in order to make out a case on the part of the complainant, it was necessary to allege that the defendant made certain claims and such allegations were held to show the existence of a Federal question.

Moore *vs.* McGuire, *supra,* cited in our brief in chief, page 25;
Crystal Springs Land and Water Co. *vs.* City of Los Angeles, 76 Fed., 148;
City Railway Co. *vs.* Citizens' Railway Co., 166 U. S., 557, and
Railway Co. *vs.* Ziegler, 167 U. S., 65,

cited in our brief in chief, on page 33, are cases of that character.

To the list the following may be added:

Railway Co. *vs.* Los Angeles, 194 U. S., 112; 48 L. Ed., 896;
Columbia Valley Ry. Co. *vs.* P. & S. Ry. Co., 162 Fed., 603;
Cooke *vs.* Avery, 147 U. S., 375; 37 L. Ed., 209.

A Federal question must necessarily arise and that must be shown by the material allegations of the complainants' bill, but that does not mean that a Federal question must necessarily be decided.

A lengthy array of decisions of this court, directly in point and so stating the rule, are cited in our brief in chief, on pages 53 to 55, inclusive.

There being no remedy at law, the choice is given to the complainants to proceed under the said sections 6115-6116 or under the said section 6870. Having chosen to proceed under the former, the sufficiency of the bill must be determined by the language of those sections as construed by the Supreme Courts of California and Montana, and if the allegations of the bill, by those decisions, declared to be necessary in order to procure the relief afforded by those sections, show that the decision of the case involves, in any aspect which it may assume, the decision of a Federal question, the case must be held to be one arising under the laws of the United States, and it is utterly immaterial that the complainants might have procured, by proceeding under the said section 6870, substantially the same relief.

IV. Does it Appear from the Necessary Allegations of the Bill that the Decision of the Case May Require a Determination of the Extent of the Area of Surface Ground which May be Embraced in a Lode Location Made Within the Limits of Ground Patented as Placer?

Appellees, in urging that this question should be answered in the negative, have made two points:

(*a*) They say that the relief is by cancellation, and that if the area embraced in the location is greater than that which the law permits, the loca-

tion on that account is not rendered invalid as an entirety, and that, therefore, the location certificate cannot be canceled, because it cannot be canceled in part and left standing as to the remainder. They cite Latham *vs.* Inman, 88 Ga., 505; 15 S. E., 8.

8. The court in that case held that the deeds which were the subject of controversy were valid as to an undivided one-half interest, and therefore declined to grant the relief which was sought, namely, that such deeds be delivered up and canceled. This was not done, however, without the remark in passing that the plaintiff might be entitled to other relief.

In this case the cancellation of the certificates is not prayed for in the bill. The prayer is, that the cloud caused by the record of such certificates be removed, and that such certificates be decreed to be no cloud upon the title of the complainants. If the certificates are void in part, to the extent that they are void, there is clearly no difficulty in granting the relief which the appellants pray, or at least in granting some appropriate relief under the general prayer. The relief which the said sections 6115-6116 provide is not only the cancellation of invalid instruments causing injury, but said sections also provide that such instruments may be declared void, and if such instruments are valid in part the court may, of course, declare them void only to the extent that they are so.

We may say here, in passing, that the bill not only alleges that the locations of defendants are each 1,500 feet by 600 feet in size, but that defendants claim the entire area so located. If defendants should be able to show themselves entitled to some area, there is no reason why the locations should not be declared void as to the excessive area.

(*b*) Appellees say, however, that the certificates of location cannot be declared to be void in part, for the reason that if they are void in part such invalidity appears upon the face of the certificates, and therefore a suit for the removal of a cloud is not the appropriate remedy.

The contention is without force. If such location certificates are valid in part, but are invalid in part, because a greater area is embraced in the location than is allowed by law, the fact of such invalidity not only does not appear on the face of the certificates of location, but it does not appear upon the face of the record, assuming that such record also shows the placer patent which is the source of complainants' title, because the extent of area which may be covered by such certificates does not appear upon the face of the record. It does appear that the lode locations are made within the exterior limits of ground patented as a placer mining claim, but the record does not show whether the placer patent is claimed to be void *in toto* on account of a prior location of the same ground, valid and existing at the date of the issuance of the placer patent, and that the land embraced in the placer patent, and all of it on that account is still open to location, or whether a certain vein or veins with an area of enclosing surface ground is claimed to have been excepted from the grant, made by such placer patent because of the known existence of such vein or veins at the date of the application for such placer patent.

The question of the extent of the area which may be embraced in such lode location involves the question also of the distance along the strike of the vein which may be located. It is the appellants' contention that a vein, if known to exist, is only subject to location to the extent that it was actually exposed at the date of the placer application; and,

of course, what portion of the vein was so exposed at such date in no place appears of record.

Before reaching a consideration of the extent of area of surface ground which may be embraced within a lode location, within the limits of ground patented as placer, the court will be called upon to determine, or at least may determine, the question whether or not the prior location of the ground covered by the Butte & Boston placer patent is not rendered of no effect on account of the decisions rendered in the adverse suits set forth in the complainants' bill. If such prior locations must be deemed to be void *ab initio*, because of the judgments rendered in such cases, then the land cannot, because of such prior locations, be held to be subject to location after the issuance of such patent, as pointed out in our brief in chief. The determination of that point involves the decision of a Federal question, and the court having held that such was the effect of such decisions, and passing to a consideration of the question as to whether or not any viens were excepted from the grant contained in the placer patent, because of their known existence, may hold that such question is concluded by the decisions in such adverse suits, and in doing so will, as is also pointed out in our brief in chief, determine another Federal question. If the contention of the appellees, under (*a*) and (*b*) above, should be accepted by the court, it does not necessarily follow, therefore, that the case is not one involving a Federal question in its decision.

V. Since the Bill Alleges that No Vein or Lode Within the Meaning of the Terms as Used in Section 2333, R. S. U. S., was Known to Exist Within the Butte & Boston Placer Mining Claim at the Date of the Application for Patent, Does it Necessarily Follow that Appellees, in a Suit Brought by Them to Recover Possession of the Land Embraced Within Their Lode Locations, Must "Inevitably" Show Such Fact?

The appellees contend that since the allegations in the bill negative the existence of such fact, and since all facts properly pleaded in the bill are, for the purposes of the motion to dismiss, deemed to be true, that should the lode claimants bring a suit based upon their locations, they could only recover by showing that the land embraced in their locations was subject to location, and this they must inevitably fail to do, because there was in fact no vein known to exist, at the date of the placer application, within the ground covered by it.

The contention of the appellees is unsound for two reasons: In the first place, the bill alleges that the defendants claim that such land is subject to location not only by reason of the known existence of such veins, but by reason also of its having been covered by prior valid existing locations at the date of the issuance of the placer patent, and the lode claimants would not, therefore, necessarily be required to show the known existence of veins in order to recover. The allegations of the bill do not negative the existence of such prior valid locations, but certain judgments are alleged as avoiding their effect. The fact that it is alleged in the bill that no vein or lode, within the meaning of said section 2333, was known to exist does not necessarily mean that there could not have been a location. A vein might exist sufficient to support a valid lode location made prior to the date of the location of the

ground as a placer claim, but such vein might not be a known vein within the meaning of said section. That this is so appears from the opinion in

Mason *vs.* Washington-Butte Mining Co., 214 Fed., 32,

where two decisions by this court are quoted from to the same effect.

And of course, too, such prior locations might have been based upon discoveries made outside of the limits of the Butte & Boston placer, but so located as to embrace the ground included in it.

In the second place, it can only be said that a party claiming under an instrument which is sought to be canceled as a cloud must, in order to recover upon such instrument, necessarily offer evidence inevitably showing its invalidity where the instrument in question depends for its validity upon some other instrument necessary to be offered in evidence in its support.

A tax deed, unless made *prima facie* evidence of the regularity of the proceedings upon which it is based, requires proof of such proceedings in order to entitle the holder of the deed to recover upon it, and if the property sought to be subjected to the assessment is insufficiently described on the assessment books, that is a fact, of course, which must inevitably be shown.

The correctness of our contention on this point will clearly appear by referring to the cases cited in support of the rule in

32 Cyc., 1315.

A case in which an application of the rule is made is

Simmons *vs.* Carlton, 33 So., 408,

from the opinion in which case we quote the following:

> "In the case of Clem *vs.* Meserole, 44 Fla., —; 32 South., 815, it is held that in actions involving title under execution sale the holder of such title cannot introduce in evidence his deed or the execution without also introducing the record of the judgment, if insisted upon by the adverse party. This being so, it necessarily follows that the appellant could not maintain in a court his title to the property purchased at the sheriff's sale without introducing evidence, to wit, the record of the judgment, upon production of which it would inevitably appear that the judgment emanated from the county court; and therefore, if it be true, as contended by appellee, that a circuit court execution cannot be issued upon a county court judgment a transcript of which has been filed in such circuit court, his own proof would show that his title is invalid."

A vein can only be held to be known to exist, within the meaning of said section 2333, when it is of sufficient value to justify exploitation and development. Whether such vein had such value at the date of the placer application, and, indeed, whether that which is claimed as a vein is in fact a vein at all, is a question which may be proved by the testimony of witnesses as to their opinions (the witnesses being qualified to give an opinion on such subject), and, of course, the opinions of different witnesses will, ordinarily, not be the same. Evidence, undoubtedly, could be produced to show that a vein was of sufficient value to justify exploitation, although such was not the fact, and the existence of the fact does not preclude the possibility of the production of such testimony.

Except for the matters considered under points

I, II, III, IV, and V, nearly all of our contentions in our brief in chief are conceded. Conceding such contentions, appellees argue, however, under two principal heads, that the decree of the court below should be affirmed.

Passing to the first of these points, we are led to the question:

VI. Are Certificates of Lode Locations, under the Montana Law, Such Instruments as Will Support a Suit for Their Removal as Clouds upon Title?

The appellees base their contention that such question should receive a negative answer on the authority of two cases, namely, Lehman *vs.* Roberts, 86 N. Y., 232, and Scott *vs.* Onderdonk, 14 N. Y., 9, and the construction placed by appellees on the language employed in 32 Cyc., 1315.

The rule by which the question is to be determined is stated in

32 Cyc., 1314,

as follows:

> "A cloud, such as equity will undertake to remove, is the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded, and which it would be inequitable to enforce."

A perfected mining location is held under a legal title as against every one save the United States. From

3 Lindley on Mines, 3d ed., sec. 773,

we quote:

> "Under the mining laws, the tenure by which the estate of the miner is held pos-

> sesses the attributes of a fee, as against everyone save the Government. Ejectment may be maintained upon an unpatented mining title. When perfected under the law, a mining location is held under a legal title as against everyone save the paramount proprietor."

The declaratory statements of location and the certificates of location, Exhibits B to J, annexed to the complainant's bill, are all in due form, and upon the face thereof are legally sufficient, all set forth the making of a sufficient discovery, and that the location described therein was made for the purpose of securing the benefit of the laws of Montana governing the manner of locating, *et cetera*, of mining claims. Such instruments, therefore, if the locations referred to therein, on account of facts not appearing of record, are in fact invalid, come clearly within the rule stated, and are claims of an interest in lands appearing of record in legal form, but which claims are in fact unfounded.

The argument of appellees is based upon the qualification of the above rule, stated in 32 Cyc., 1315, as follows:

> "Equity will not interfere to remove a cloud on title where the invalidity of the instrument or claim complained of appears on its face; *where extrinsic facts must be proved for the purpose of establishing its validity;* or where the party claiming under it must, in order to recover thereon, necessarily offer evidence inevitably showing its invalidity and destroying its effect."

The particular clause relied upon by the appellees, we have placed in italics.

Passing for the moment the question of whether the qualification to the rule is correctly stated, we submit that the language does not warrant the interpretation given it by the appellees.

In undertaking to apply the language to the facts of this case, appellees have interpreted it as meaning that equity will not interfere when a claim appearing of record and valid on its face requires proof of extrinsic facts for the purpose of enforcing it; and the appellees, while claiming that though a certificate of location, under the Montana law, if in due form, is *prima facie* evidence of every fact necessary in order to show a perfected location other than the making of a discovery, contend that since extrinsic proof is necessary to show the fact of a discovery a court of equity will not grant relief by way of declaring such certificates to be void, notwithstanding that while they remain of record the true owners will not be able to find a purchaser for the land affected by them, and notwithstanding the fact that since the question whether or not the veins, made the basis of such locations, were known to exist on May 11, 1891, the date of the application for the patent which was issued to the complainant's predecessors in interest, is determinative of the question whether or not the land upon which such locations were made was open to location at the date of the making of such locations, and such question can only be settled by the testimony of witnesses acquainted with the land in question on that date, the rights of the complainants are liable to be entirely lost on account of the death or change of residence of the persons upon whom they must rely to rebut the testimony which may be produced by the lode claimants.

A correct interpretation of the language of the text quoted is, that equity will not give relief by way of removal of a cloud where the instrument

complained of as casting a cloud, or the record which must necessarily be put in evidence to support it, appears on its face to be invalid, and extrinsic evidence is necessary to contradict such apparent invalidity.

Scott *vs.* Onderdonk, *supra*, was a suit to enjoin the issuance of a tax deed upon the ground that there had been no valid levy of the tax upon which such proceedings were based. The injunction was granted upon the theory that the tax deed when issued would be *prima facie* evidence of the regularity of all prior proceedings. In considering the case, however, the court discusses the case as it would be presented if the tax deed was not evidence of the regularity of any prior proceedings, and in that portion of the discussion is to be found the qualification to the rule, which is stated as follows:

> "If, however, the claim is based upon a written instrument which is void upon its face, *or which does not in its terms apply to the property it is claimed to affect*, there seems to be no reason for entertaining a litigation respecting it."

The gist of the rule appears in the clause which we have placed in italics.

If the instrument upon its face applies to different property from that in question, and can only be shown by extrinsic evidence to apply to such property, the instrument belongs to the same class as an instrument apparently void upon its face.

The portion of the opinion in Scott *vs.* Onderdonk, *supra*, quoted on page 19 of appellees' brief, is as follows:

> "The same reason applies to cases where the claim requires the existence of a series of facts or the performance of a succession

> of legal acts, and there is a defect as to one or more of the links. Van Doren *vs.* Mayor, 9 Paige, 388; Mayor *vs.* Merserole, 26 Wend., 132."

Van Doren *vs.* Mayor was a suit to enjoin the collection of certain assessments levied upon real property. A demurrer to the bill was sustained on the ground that the invalidity of the assessment appeared upon its face and that, therefore, a deed which might be given to a purchaser at a sale of such land to enforce the collection of such assessment, could not be proved except by proof also of such invalid assessment, and for that reason such deed would not constitute a cloud.

Mayor *vs.* Meserole, *supra*, was a case of the same character, and was disposed of upon the same theory.

The learned judge had in mind, it is clear therefore, when the language last quoted was used, a case like that of a deed issued by a sheriff in pursurance of a sale under an execution issued upon a void judgment, and it being necessary, in order to recover under the deed, to put in evidence all of the antecedent proceedings upon which it was based.

That is a case where the claim requires the performance of a succession of legal acts, and there is a defect as to one of the links.

The case of Lehman *vs.* Roberts was a suit brought by Aaron Lehman against Edward Roberts to enjoin the enforcement of a decree of foreclosure entered in a suit to foreclose a mechanic's lien brought by Edward Roberts against James Hill.

At the time such decree of foreclosure was entered, James Hill was not the owner of the property and did not appear to be so by the record, and

the decree of foreclosure was a decree merely for the sale of the interest which James Hill had in the property. As James Hill had no interest in the property, it did not appear upon the record that the decree of foreclosure was of any validity. It could only be shown to be valid by going beyond the record and showing that while the title on the face of the record stood in the name of some other person, the property was in fact owned by James Hill, against whom the decree of foreclosure was rendered. The court in holding that such a decree does not constitute a cloud, such as a court of equity will remove, took occasion to remark that an action to remove a cloud from title can only be maintained where the pretended title, which is alleged to constitute the cloud, is apparently valid on its face.

Stokes *vs.* Houghton, 45 N. Y. S., 21,

was a suit to have declared void a mortgage which it was alleged had ceased to be of any validity. When originally given, it was to secure the mortgagee from liability on account of his becoming surety for certain receivers in an action brought by the plaintiff, the mortgagor, but that any further liability upon such bond had ceased, the receivership proceedings having been discontinued and an order made canceling the bond and discharging the sureties.

In defense of the suit, it was argued that since the mortgage recited the receivership proceedings and the record showed that the receivership proceedings had terminated, the case was within the rule as stated in Scott *vs.* Onderdonk, *supra*.

In deciding against the validity of such defense, the court in referring to that case said:

> "The former (referring to Scott *vs.* Onderdonk and similar cases) dealt for the

> most part with leases or other instruments in the chain of a tax title; they were either void upon their face or defective for the lack of additional proceedings necessary to give them validity."

A tax deed, if not *prima facie* evidence of the regularity of prior proceedings, would belong to the same class as the cases cited in Scott *vs.* Onderdonk, *supra*.

In all of these cases it is to be seen that the record necessary to support the claim made under the instrument in question upon its face showed that such instrument was invalid, while with reference to the certificates of location, here considered, there is nothing in the record to show any invalidity or imperfection whatever.

The authorities, however, do not all support the rule stated in the cases relied on by appellees.

Pixley *vs.* Huggins, 15 Cal., 128.

A consideration of some of the cases in which relief has been granted, by canceling certain instruments as clouds upon title, will show very clearly the error of appellees in the construction which they place upon the qualifications of the rule stated in 32 Cyc., 1315.

The laws of most of the States give a lien to persons performing labor or furnishing material for the construction of a building, or other improvement on real estate.

In order to obtain the benefit of the law, it is necessary for the lien claimant to make and file in some designated office a claim of lien, in which is required to be set forth a statement of the account for labor done or material furnished; but the claim of lien, so filed, is not *prima facie* evidence of the performance of such labor or of the furnishing of such material, or of any other fact, except the mere

fact of the filing of such lien claim. Though the account embraced in such claim of lien be untrue in fact, and no labor has been done or material furnished, it would nevertheless constitute a cloud upon the title of the property affected by it, contrary to the statement of the qualification of the rule made by appellees, for the lien claim requires for its validity the existence of a series of facts, and the existence of one of such necessary facts would, in the case we have supposed, be wanting.

So mortgages and all other lien claims of every description, according to a well-established rule, if valid upon their face but invalid on account of extrinsic facts (though appellees' contention would require a contrary rule), are held to be clouds upon title, which equity will remove.

32 Cyc., 1319 to 1321.
Sheets *vs.* Prosser, 112 N. W., 72.

In

Moore *vs.* McGuire, *supra,*

the validity of the tax deeds in question could only be shown to be valid by showing that the land in question was in Mississippi, which was a matter which could only be shown by parole evidence as to the course of the main channel of the Mississippi River.

The whole contention of appellees upon this point, however, is based upon the contention that the certificate of location is not *prima facie* evidence of a discovery. According to a well-settled rule, however, such certificates will, by the mere lapse of time, become *prima facie* evidence not only of a discovery, but of a valid location.

Cheesman *vs.* Shreeve, 40 Fed., 787.
Cheesman *vs.* Hart, 42 Fed., 98.
Vogel *vs.* Warsing, 146 Fed., 949.
Thomas *vs.* South Butte Mining Co., 211 Fed., 105.

If the certificates of location in question here are not now *prima facie* evidence of a discovery and of a valid location, all that is required to enable them to have that effect is, that they should merely be allowed to stand unchallenged, and if time will give them that effect, they must at the present time be deemed to be clouds upon title.

In

> Acord *vs.* Western Pocahontas Corporation, 156 Fed., 989,

in the course of the opinion it is said:

> "And, further, any pretended conveyance which, if left undisturbed, may ripen into a perfect title, must necessarily create a cloud upon the true title."

Now, it is well settled that the jurisdiction in this class of cases is preventive as well as remedial.

Many authorities are cited in our brief in chief, pages 15 to 17, to that effect.

The bill in this case, therefore, is sufficient to invoke the equitable jurisdiction of the court, whether the certificates of location are or are not ordinarily *prima facie* evidence of a discovery, for they will be removed as clouds if they will, if undisturbed, ripen into clouds.

It will be remembered, however, that in

> Hicks *vs.* Rupp, *supra*,

the Supreme Court of Montana said concerning said sections 6115-6116: "These provisions taken together clearly define the rule *with its limitations* under which the equitable jurisdiction of the court may be invoked."

The italics are ours.

If the statute not only defines the rule but fixes the limitations upon it, then we only have to look to these sections of the statute to determine

whether or not the limitations upon the rule exist for which the appellees contend. As they are not to be found in the statute, under the decision last referred to, they must be held not to exist.

VII. Does the Bill Show that the Question of the Extent of the Conclusiveness of the Judgments Rendered in the Adverse Suits Requires the Determination of a Federal Question?

The appellants contend (brief in chief, pages 42 to 45, inclusive) that because of the judgments rendered in the adverse suits, pleaded in the bill, regardless of what the actual facts were, the Point Pleasant and Pleasant View lode claims, which were prior to the Butte & Boston placer location and covered in part the same ground, must be held to have been void *ab initio*, and insufficient to present any obstacle to the issuance to the subsequent locators of patent for the said Butte & Boston placer.

The bill alleges that the defendants claim, that by reason of such prior lode locations the patent for the Butte & Boston placer was rendered void as to the ground in conflict. The argument was made by the same solicitors who appear here for the appellees, in the case of Mason *vs.* Washington-Butte Mining Co., 214 Fed., 32 (their argument being based on Belk *vs.* Meagher, 104 U. S., 279; Noyes *vs.* Mantle, 127 U. S., 348; Brown *vs.* Gurney, 201 U. S., 184, and Farrell *vs.* Lockhart, 210 U. S., 142); that mineral ground covered by a valid location is, during the life of the location, segregated and not open to location by another; that the Point Pleasant and Pleasant View lode claims were prior to the location of the Butte & Boston placer claim, and were valid and existing

at the date of the issuance of the Butte & Boston placer patent and that notwithstanding the judgments in the adverse suits the Butte & Boston placer location must have been void from the beginning, and the patent for said claim, to the extent of the ground in conflict, was also void.

Appellees now make the contention, as we understand them, that the question in this case, as to whether or not such prior lode locations did have that effect, is not sufficient to raise a Federal question, because, as they claim, the question has been settled by the decision of this court in the case of Clipper Mining Co. *vs.* Eli M. & L. Co., 194 U. S., 220; which was an adverse suit brought by the owners of a placer mining claim against an application for patent for a lode claim within the exterior boundaries of the placer location. Prior to the application by the lode claimant for a patent, the owners of the placer claim had made application for patent, and such application had been rejected. Notwithstanding such action by the Land Department, the District Court of Lake County, Colorado, in which court the adverse suit was brought, found as a fact that at the date of the lode location the placer location was valid and existing. In affirming the judgment, which was in favor of the placer claimants, this court took occasion to remark that such judgment could not conclusively determine which of the parties was entitled to patent, and that the United States was not a party to such adverse suit.

The language of the court upon this point, which we quote here, was as follows:

> "We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of injury by the Government, or

that the judgment necessarily gives to them the lodes in controversy. In 2 Lindley on Mines, sec. 765, the author thus states the law:

"'Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether or no the conditions of the law have been complied with in good faith.'"

In order to give the decision of the court in that case the effect that appellees claim for it, it must have been a decision squarely in point upon the question whether or not the existence of the prior lode locations would render the Butte & Boston placer void as to the ground in conflict, taking into account the fact of the rendition of the judgments in the adverse suits.

Is it the argument of the appellees that, because of the decision of this court in the Clipper Mining Co. case, it must be held that proof of the existence of such prior lode locations will render the Butte & Boston placer void as to the ground in conflict, notwithstanding the decisions in the adverse suits? If they intend to so argue, it is evident that they have overlooked the fact that the decision in the Clipper Mining Co. adverse suit was in favor of, and not against, the prior location. Had the decision of the lower court been in favor of the subsequent lode location and the lode claimant had proceeded under such judgment and had procured a patent, and had some third party attempted subsequently to make a location of the same ground on the theory that the subsequent lode location was rendered void because of the existence, at the time

of the making of such location, of a prior valid existing location covering the same ground, and had the question been presented to this court whether or not it was open to such third party, notwithstanding such judgment in the adverse suit, to make proof of the existence of such prior location for that purpose, then the decision of this court must have been considered as settling one of the questions presented here as to the extent of the conclusiveness of the judgments rendered in the adverse suits.

It is true that this court said the United States was not a party to the adverse suit. The Circuit Court of Appeals for the Ninth Circuit said the same thing, but at the same time held that the judgments in the adverse suits, which we have pleaded, did have the effect of rendering the prior locations void *ab initio*, and in doing so found it necessary to construe section 2326, R. S. U. S., as appears from the opinion in Mason *vs.* Washington-Butte Mining Co., *supra*.

The appellants also contend that, regardless of what the facts may have been, it is not now open to the appellees to say that a vein was, or veins were, known to exist within so much of the Butte & Boston placer as was in controversy in the said adverse suits at the date of the application for the said placer patent, because that was a question which was necessarily involved in the adverse suits and was determined by the judgments rendered in them, and while the United States was not, strictly speaking, a party to such suits, it was, as was said by the Supreme Court of the State of Montana in the case of—

> Wilson *vs.* Freeman, 29 Mont., 470; 75 Pac., 84,

a *quasi* party to such suits, and was, to such an extent, a party, that persons subsequently attempting

to acquire title from the United States by the location of a vein, upon the theory that the same was known to exist at the date of the placer application for patent, must be held to have been concluded by the decision in such adverse suits. This question cannot be held to have been settled by any decision by this court until a case is presented to it involving the same question; and it is not sufficient that this court may have said, in a case based upon an entirely different state of facts, that, strictly speaking, the United States is not a party to an adverse suit. What is necessary in order to settle that question is that it must have said, in a case involving the same facts, that the United States is not to any extent, in any sense, or for any purpose deemed to be a party to such suit. The appellants do not contend that patent must necessarily be issued to the prevailing party in an adverse suit. They do contend that as between the parties to such suit the Land Department cannot determine that the one against whom judgment was rendered was entitled to the possession; and, so far as the question of possession is concerned between the parties plaintiff and defendant to the adverse suit, the United States is bound by the decision in such suit.

As to either one or both of our contentions with respect to the extent of the conclusiveness of the judgments rendered in the adverse suits, the decision may be either for or against us; but however the questions are decided the construction of certain statutes of the United States will be necessary.

The appellees say, however, that judgments in the said adverse suits have not been pleaded by us with sufficient certainty. They say that the cause of action here is not the same as the cause of action in the adverse suits, and that the decision of the adverse suits is not conclusive as to any question

which may have been, but which was not, actually passed upon in those cases.

Our answer to the contention is that since an issue is tendered by the bill here which requires a determination of the question of the known existence of a vein or veins within that part of the Butte & Boston placer which is involved in the controversy in this case at the date of the application for such placer patent, and since it clearly appears by the allegations of the bill that the same issue was presented in the adverse suits, and, further, since the decision of the question of the known existence of the said vein or veins was necessarily involved in the said adverse suits the judgments pleaded could not have been rendered without deciding such question, it must be held that such question is not one which merely may have been decided in such case, but it must be held to have been actually decided.

It appears from the bill that the ground there described was embraced in two lode locations, known respectively as the Point Pleasant and Pleasant View lode claims, which lode claims were prior to the location of the Butte & Boston placer; that such lode claimants filed in the United States Land Office, in due time, two adverse claims to the application of the placer owners for a patent; that such adverse claims were in due form, and by the same the lode claimants asserted adversely to the applicants for the said patent a claim of the right of possession to so much of the land embraced in the application for patent as was in conflict with the said lode claims, and that the ground described in the bill is embraced within the ground which was so in conflict; that within due time after the filing of said adverse claims an adverse suit was filed by the said adverse claimants, with respect to each of the said adverse claims, in the Montana Second Judicial District Court, a court of general juris-

diction; that the complaint in each of the said suits was in due form of law to determine the right of possession as to the land embraced in said adverse claims; that the said applicants for patent, the defendants in said suits, filed an answer in each of said suits; that the said suits were regularly heard and determined, and a decision and judgment given and made in each of them in favor of the defendants; that a certified copy of the judgment-roll in each of said suits was filed in the United States Land Office, for the proper district, together with the requisite description and certificates of the Surveyor General, whereupon the said proceedings and the said judgment-rolls being certified to the Commissioner of the General Land Office, the said patent was issued in conformity with the said judgments.

Concerning the character of an adverse suit, the following extract is from

3 Lindley on Mines, 3d ed., sec. 754:

> "The proceedings are said to be purely statutory, and have their inception not in the court in which the suits were commenced, but in the land office.
>
> "The object of the action is not, strictly speaking, to determine the title to real estate, because the fee resides in the Government. The true question for discussion is which of the contending parties has complied with the requirements of the law and is prior in time. In other words, in whom is the present right of possession?
>
> "It is not sufficient that one party should establish a better title than the other, but the prevailing party must show clearly a valid right of possession based on a compliance with the mining statutes.
>
> "In suits of this character the United

States has been said to be a *quasi* party, and if neither plaintiff nor defendant is entitled to a patent, the court must so find. * * *

"If both fail to establish such right of possession in court, neither can recover; so that each must rely upon the strength of his own title, and not on the weakness of his adversary. Each party is practically a plaintiff and must show title."

The appellees rely upon 2 Black on Judgments, sec. 609.

From

2 Black on Judgments, sec. 613,

we quote the following:

"The rule stated in the preceding section cannot be fully comprehended and accurately applied unless we take into account the very important distinction between possible or probable inferences from the judgment and the necessary conditions to the adjudication. Necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. 'The estoppel is not confined to the judgment,' says the Supreme Court of Massachusetts, 'but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason to back from a judgment to the basis upon which it stands, upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.'"

From

10 Enc. U. S. Supreme Court Reports, 738,

we quote as follows:

> "It is well settled that the estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to *any essential fact* or question in the one action is conclusive between the parties in all subsequent actions, so long as the judgment in the first suit remains unmodified."

The italics are ours.

From

10 Enc. U. S. Supreme Court Reports, 769,

we quote as follows:

> "The above principle as to the conclusiveness of a judgment in subsequent controversies between the same parties, has been applied to * * * the legality of the location of a mining claim."

In

Last Chance Mining Co. *vs.* Tyler Mng. Co., 157 U. S., 683; 39 L. Ed., 859,

the question was presented as to the conclusiveness of a judgment rendered in an adverse suit. The

Tyler lode mining claim and the Last Chance lode mining claim were in conflict to the extent of a triangular piece of ground, shown in the diagram on page 685 of 157 U. S.; the owner of the Tyler claim made application for patent, which application was, to the extent of the said area in conflict, adversed by the owner of the Last Chance claim, and the owner of the Last Chance claim then brought suit, in a court of competent jurisdiction, to determine as between the parties the right of possession to the said area in conflict, in which suit the owner of the Tyler claim appeared and filed an answer. While the adverse suit was pending, the owner of the Tyler claim amended his application to purchase in the land office by excluding therefrom a rectangular piece of ground which included the triangular area in conflict; and when the adverse suit came on for trial he withdrew his answer in the case and a judgment was rendered in favor of plaintiff, the owner of the Last Chance claim. The owner of the Tyler claim obtained patent for the whole of that claim, excluding the rectangular area which had been excluded by the amendment to the application to purchase, and the owner of the Last Chance claim obtained a patent. Suit was brought for the purpose of determining the ownership of an ore body, which lay beneath the surface of the Last Chance claim and in that portion of a vein, the apex of which passed through both of the end lines of the Tyler claim, which lay within vertical planes drawn downward through the end lines of that claim, and which ore body also lay in that portion of the same vein, the apex of which vein passed through the side lines of the Last Chance claim, which lay between vertical planes drawn downward through the side lines of that claim, and the right to the ore body therefore depended upon the priority of location as between the two claims. The situation will be readily un-

derstood by referring to the diagram on page 685 of 157 U. S.

On the first trial of the suit in the Circuit Court for the District of Idaho, the judgment in the adverse suit was admitted in evidence. On appeal to the Circuit Court of Appeals for the Ninth Circuit, the decision of the Circuit Court was reversed, and it was held that such judgment was improperly admitted. A retrial was had in the Circuit Court and a second appeal to the Circuit Court of Appeals, and from the decree there rendered the case was brought into this court by certiorari, where it was held by this court that such judgment was properly admitted in evidence. Concerning the point, Mr. Justice Brewer, in delivering the opinion of the court, said:

> "The defendants by the proceedings which they initiated in the land office compelled the plaintiffs to institute a suit in a court of competent jurisdiction to enforce their rights. After such suit has been commenced and the defendants have been made parties thereto, and the court has proceeded to judgment, will the defendants be heard to say that that judgment amounts to nothing? We are clearly of the opinion that this cannot be tolerated, that the judgment was in all respects regular, that it was conclusive as to the particular ground in controversy, and *binding by way of estoppel as to every fact necessarily determined by it*, and that priority of location was one fact so determined." (The italics are ours.)

The claim or demand in that suit was not the same as in the previous adverse suit between the same parties. The triangular piece of ground referred to above was in controversy in the adverse

suit, while an ore body, under an entirely different piece of ground and in a vein which did not apex in such triangular piece of ground, was in controversy in the second suit.

In—

> Northern Pacific Railway Co. *vs.* Slaght, 205 U. S., 134; 51 L. Ed., 742,

which was an action of ejectment brought by the plaintiff in error against the defendants in error in the Superior Court of Whitman County, Washington, the question was presented as to the conclusiveness of a judgment between the same parties previously rendered in an action between them to quiet title. The plaintiffs in error sought to avoid the conclusiveness of such former judgment on the ground that the question involved in the second suit was different from that which was actually passed upon in the first suit, and that the effect of the judgment rendered in the first suit was only to decide against the title specially set forth in the pleading in that case.

This court, in deciding that the matter was concluded by the judgment rendered in the former suit, said:

> "This doctrine has illustrations in suits to quiet title. It was decided in Lessees of Parrish *vs.* Ferris *et al.*, 2 Black, 606; 17 L. Ed., 317, that the judgment in an action to quiet title is conclusive of title, whether adverse to the plaintiff in the action or to the defendant."

For the purpose of showing that the prior lode locations did not, after the rendition of the judgments in the adverse suits, present any obstacles to the issuance of a patent to the subsequent placer claimants, it was only necessary to show that the judgment was regularly rendered by a court of

competent jurisdiction, in an adverse suit, involving a controversy between the lode claimants on the one hand and the placer claimants on the other, affecting their rights of possession. Whatever effect such judgments had as against the claim of a valid prior location of the ground included in the placer patent, they had because it had been determined in the adverse suits that the right of possession was in the placer claimants.

The claim of the appellants, that such judgments are conclusive upon the question of the known existence of a vein within the ground in conflict, is based on the fact that it was determined in the adverse suits that there was no vein known to exist within such ground, and that as between the same parties that question is concluded whenever it is again brought in issue.

There is no question here but that the parties now before the court are in privity with the parties to the adverse suits. That is conceded by appellants' contention that the former judgments are not sufficiently pleaded. Now, since the present parties are in privity with the parties in the adverse suits, and since one of the questions in this case is the question of the known existence of such veins, it is only necessary, in order to show that the judgments in the adverse suits are conclusive, to show that the same question was necessarily decided in those cases.

It sufficiently appears from the bill that the question of the right of possession as to the ground in conflict was presented to the court for decision and that the decision of the court was in favor of the defendant. As the judgment must necessarily go against both of the parties, if neither of them is entitled to the possession, the judgment in favor of the defendant declaring that the defendant had the right of possession necessarily included a decision that there was no known vein within the ground in

conflict, because the defendant's claim was based on a placer location merely, and if a vein had been known to exist within such ground, the placer location would not have given the placer locator any right to the possession of it, or of a specified area of surface ground enclosing it. As the right of possession as to the whole of the ground in conflict was given to the defendant, it was of necessity determined that there was no such known vein.

It is true that it does not appear whether the suit was an action of ejectment or a suit to quiet title; it must have been one or the other, and in either case as between the parties the question of title was involved.

In Northern Pac. Ry. Co. *vs.* Slaght, *supra*, it was said that by a judgment in favor of the plaintiff and against the defendant, in a suit to quiet title, every *possible* interest of the defendant is cut off.

We submit therefore that the question of the extent of the conclusiveness of such judgments is an open one, that the judgments are sufficiently pleaded, and that a Federal question is involved in the decision of the case, whether it be one to remove a cloud or to determine an adverse claim under the statute.

Respectfully submitted,

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,
D. M. KELLY,
Solicitors for Appellant, Anaconda Copper Mining Company.

J. L. TEMPLEMAN,
JOHN A. SHELTON,
Solicitors for Appellant, Washington-Butte Mining Company.

H. C. HOPKINS AND
JOHN A. SHELTON,
Solicitors for Appellant, Olivia H. Hopkins.